No. _____

In The
Supreme Court of the United States

RICHARD R. RICHARD, JR., on behalf of himself and all others similarly situated,

Petitioners,

v.

HOECHST CELANESE CHEMICAL GROUP, INC., SHELL OIL COMPANY d/b/a SHELL CHEMICAL COMPANY, HOECHST CELANESE CORPORATION, and E. I. DuPONT de NEMOURS & COMPANY,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the *Rooker-Feldman* doctrine bar federal courts from reviewing for constitutional defects the approval procedure of a state class action settlement to determine whether the state judgment is entitled to full faith and credit?

2. Does the "innocent agent" doctrine codified in 18 U.S.C. § 2(b) afford sufficient state action to maintain a 42 U.S.C. § 1983 claim where unethical class counsel wilfully deceive a state court into approving a collusive settlement that is constitutionally defective?

3. Does 18 U.S.C. § 1964 authorize private plaintiffs to obtain equitable remedies, and if so, does the availability of a broad disgorgement remedy allow district courts to certify a RICO class for settlement purposes?

PARTIES TO THE PROCEEDINGS

PETITIONERS

Richard R. Richard, Jr., on behalf of himself and all others similarly situated.

RESPONDENTS

Hoechst Celanese Chemical Group, Inc.; Shell Oil Company d/b/a Shell Chemical Company; Hoechst Celanese Corporation; and E.I. DuPont de Nemours & Company.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully pray for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit entered on December 19, 2003.

OPINIONS BELOW

The decision of the United States District Court for the Eastern District of Texas (Texarkana Division) is reported at 208 F.R.D. 575 (E.D.Tex. 2002) and reprinted in the Appendix to this Petition. (App. 21-53.)

The decision of the United States Court of Appeals for the Fifth Circuit is reported at 355 F.3d 345 (5th Cir. 2004) and reprinted in the Appendix to this Petition. (App. 1-20.)

The Order of the United States Court of Appeals for the Fifth Circuit denying rehearing and rehearing *en banc* is reprinted in the Appendix to this Petition. (App. 59-60.)

JURISDICTION

The jurisdiction of this Court rests on 28 U.S.C. § 1254. The judgment of the United States Court of Appeals for the Fifth Circuit was entered on December 19, 2003. (App. 54-55.) Petitioners' timely petitions for rehearing and rehearing *en banc* were denied on February 11, 2004. (App. 59-60.)

STATUTORY PROVISIONS

18 U.S.C. § 2(b) provides, in relevant part:

Whoever wilfully causes an act to be done which, if directly performed by him or another would be an offense against the United States, is punishable as a principal.

18 U.S.C. § 1964 provides, in relevant part:

(a) . . . district courts . . . shall have jurisdiction to prevent and restrain violations of section 1962 . . . by issuing appropriate orders, including but not limited to: ordering any person to divest himself of any interest . . . in any enterprise; imposing reasonable restrictions on the future activities of any person . . . , or ordering dissolution or reorganization of any enterprise. . . .

(b) The Attorney General may institute proceedings under this section. Pending final determination thereof, the court may at any time enter such restraining orders or prohibitions, or take such other actions . . . , as it shall deem proper.

(c) Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damage he sustains and the cost of the suit, including a reasonable attorneys' fee. . . .

28 U.S.C. § 1738 provides, in relevant part:

Judicial proceedings . . . shall have the same full faith and credit in every court within the United

> States . . . as they have . . . in the courts of such State . . . from which they are taken.

42 U.S.C. § 1983 provides, in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom or usage . . . subjects or causes to be subjected, any citizen . . . to the deprivation of any rights . . . secured by the Constitution and laws, shall be liable to the party injured in an action at law, a suit in equity, or any other proper proceeding for redress.

STATEMENT OF THE CASE

This Petition sets out multiple conflicts among the circuits raised by the Fifth Circuit's decision: (1) the misapplication of the *Rooker-Feldman* doctrine[1] to insulate collusive state class actions from constitutionally-based federal court review sought by individuals not members of the class, (2) the disregarding of the theory of innocent agency to make out state action in civil rights actions based on violations of constitutional rights, and (3) the gutting of the equitable remedy of disgorgement under RICO as a theory to sanction perpetrators of class action frauds. Review by this Court, therefore, is required.[2]

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[1] The *Rooker-Feldman* doctrine takes its name from *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923) and *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983). Under *Rooker-Feldman*, a federal district court does not have subject matter jurisdiction to hear a direct appeal from the final judgment of a state court.

[2] While these are the principal issues, this Petition necessarily includes other conflicts:

(Continued on following page)

The principal issue here involves the application of the *Rooker-Feldman* doctrine. The doctrine bars federal courts from considering subsequent claims *only* insofar as prior state judgments are entitled to full faith and credit – a question, in the first instance, that is a matter of state law. *Matsushita Elec. Indus. Co. v. Epstein*, 516 U.S. 367, 373 (1996) ("a federal court must give the judgment *the same effect* as it would have in the courts of the State in which it was rendered") (emphasis added).

Here, the Fifth Circuit recognized that if the state court procedures were constitutionally improper, then *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811-12 (1985) (courts may exercise jurisdiction over absent class members only if due process procedures are met), establishes that Respondents were not bound by the prior state court judgments, and the *Rooker-Feldman* doctrine did not apply. (App. 9-10.) Nevertheless, the decision of the Fifth Circuit permits state courts to execute an end run around these constitutional protections. The Circuit perversely held that federal courts may not consider whether the state procedures were consistent with due process because "a federal court cannot examine the due process deficiencies in *Cox* without disturbing the underlying judgment." (App. 11.)

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1. With the Seventh and Eleventh Circuits on the right to amend a complaint to reflect the law (*infra* nn.6 and 13), and

2. With the Ninth and Second Circuits on the right to amend a complaint to reflect new pleading requirements in the law (*infra* n.18).

This reasoning sets up a false dichotomy between *Shutts*, which holds that due process requirements must be met in *all* class action judgments, 472 U.S. at 803-06, and *Rooker-Feldman's* prohibition against federal court review of state court judgments or findings. The dichotomy ignores that under the Supremacy Clause, Tennessee courts themselves are obligated to apply the *Shutts* requirements. Accordingly, to give *Cox v. Shell Oil Co.*, No. 18,844 (Chanc. Ct., Obion County, Tenn., Nov. 17, 1995) – or any other jurisdictionally defective state court judgment – preclusive effect over claims of an absent class member is wrong as a matter of *state* law. Thus, the scope of *Rooker-Feldman* is initially limited by state law.[3] And, if the *Rooker-Feldman* doctrine does not apply, then issues arise, noted below, concerning Petitioners' civil rights and RICO claims.

Petitioners own and live in mobile homes in Texas that were damaged by leaks from a polybutylene ("PB") plumbing system that Respondents defectively made and fraudulently marketed.[4] Damages approach eight billion dollars. During years of widespread litigation, Respondents contested all PB cases. Then, in an effort to cap their PB liability, they suddenly caused to be brought and immediately settled two state class actions, both filed in out-of-the way venues – *Cox* (Obion County, Tenn.) – and

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[3] *See, e.g., ITT Corp. v. Intelnet Int'l Corp.*, 2004 U.S. App. LEXIS 8168 at *13-14 (3rd Cir. April 26, 2004).

[4] This statement of facts derives from Petitioners' pleadings, which are accepted as true for purposes of a motion to dismiss. *See Leatherman v. Tarrant City Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 164 (1993). (*See* App. 3-6.)

Spencer v. Shell Oil Co., No. CV94-074 (Cir. Ct. Greene County, Ala.).

These two class actions purportedly covered *all* PB litigation then pending anywhere or to be filed in the future, even though *Cox* and *Spencer* were filed in state courts that could not obtain jurisdiction over out-of-state individuals unless constitutional processes were followed. Petitioners did not have (and as an absent *future* class member, *could* not have had) notice of the Tennessee or Alabama class actions. They could not, in fact, receive adequate representation by the present class representatives (no subclass was established for future class members) or by the class counsel who filed and immediately settled the actions. Both settlements favored Respondents, containing, for example, an obscure loophole that excluded countless leaks from recovery and providing that funds not distributed to the class would be returned to Respondents when administration of the funds terminated, contrary to standard practice. Substantial side payments to class counsel were made but not disclosed to class members or the courts that approved the settlements.

During the district court proceedings in this litigation, Petitioners and DuPont, which did not admit any wrongdoing in the prior litigation, agreed to a settlement that would rectify defects in the original settlements, for example, adding additional money to the fund, giving class members constitutionally adequate notice, and closing the loophole, noted above, for members of the new class. DuPont's laudable efforts to do the right thing for members of the class were frustrated by its fellow Respondents. The settlement, of course, was contingent on the district court finding that it had jurisdiction to settle the litigation on a nation-wide basis, as the state courts had not had. As

such, the settlement has not yet been implemented, much to the detriment of the rights of the class.

In the instant litigation, Petitioners also made a civil rights claim under 42 U.S.C. § 1983 based on the unconstitutional settlement of the class actions. Two theories support the "state action" portion of Petitioners' claim. First, the *Cox* judge was an "innocent agent" of unethical class counsel. "Innocent agent" jurisprudence, reflecting law settled at least as early as the 16th century,[5] holds responsible for civil rights violations private actors who willfully cause innocent state actors to perform proscribed acts. *See, e.g., United States v. Rashwan*, 328 F.3d 160, 165 (4th Cir. 2003). Thus, the Fifth Circuit here conflicts with *Rashwan*. Second, the Tennessee court's judicial independence was compromised. The record raises the substantial possibility of judicial malfeasance (bribery) sufficient to constitute state action by the state judge, or at least mandate remand to amend and conduct discovery to establish the facts. *See Dennis v. Sparks*, 449 U.S. 24, 29 n.5 (1980) ("To act 'under color' of law does not require that the accused be an officer of the State. It is enough that he is a willful participant in joint activity with the State or its agents.").

Finally, Petitioners contend that 18 U.S.C. § 1964, RICO's civil remedies section, allows them to seek disgorgement of profits Respondents unlawfully obtained in violation of 18 U.S.C. § 1962. The Fifth Circuit restricted RICO's disgorgement remedy to reach only future action,

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[5] *See United States v. Lester*, 363 F.2d 68, 72 (6th Cir. 1966) (tracing doctrine back to *Regina v. Saunders*, 2 Plowd. 473 (1575)).

and, even at that, precluded its application here. The Fifth Circuit was skeptical of, but did not reach, the question of private equity relief under RICO upheld in *NOW v. Scheidler*, 267 F.3d 687, 697-98 (7th Cir. 2001), *cert. granted on issue, but rev'd on other grounds*, 537 U.S. 393, 397 (2003). The Court disposed of the question by giving a narrow construction to RICO's disgorgement remedy (if any, in the view of the panel), that is inconsistent with disgorgement jurisprudence. *SEC v. First Jersey Securities, Inc.*, 101 F.2d 1450, 1474 (2d Cir. 1996) (purpose of disgorgement is deprivation of past illegal gains and general deterrence).[6] It is even inconsistent with the decision of the Second Circuit that it purported to follow: *United States v. Carson*, 52 F.3d 1173 (2d Cir. 1995).

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[6] Petitioners were denied an opportunity to amend to conform with requirements, which were imposed for the first time contrary to Fifth Circuit precedent (*SEC v. Blatt*, 583 F.2d 1325, 1335 (5th Cir. 1978)). As Judge Wiener's dissent correctly observes, the majority's narrow interpretation elevates form over substance. (App. 19.) It was unfair to require Petitioners to allege "those talismanic words" that "disgorgement would 'prevent and restrain' similar RICO violations in the future" (*Id.*) when the Fifth Circuit had not articulated such a requirement before and to deny Petitioners an opportunity to amend. Thus, the Court's decision is contrary to amendment jurisprudence. *See, e.g., Emery v. American General Finance, Inc.*, 71 F.3d 1343, 1348 (7th Cir. 1995); *Warner v. Alexander Grant & Co.*, 828 F.2d 1528, 1530 (11th Cir. 1987).

REASONS FOR GRANTING THE WRIT

I. The Fifth Circuit's Decision That The *Rooker-Feldman* Doctrine Precludes District Courts From Considering Due Process Deficiencies Or Fraud In State Class Action Settlement Procedure Conflicts With 28 U.S.C. § 1738 And Decisions Of Other Circuits.

A. 28 U.S.C. § 1738 Requires District Courts To Determine If State Court Judgments Merit Full Faith And Credit Before Giving Them Preclusive Effect.

To understand the conflict in the circuits, an examination of the erroneous reading of the law of the Fifth Circuit is useful, although merely correcting those errors is not the principal thrust of this Petition. 28 U.S.C. § 1738, the Full Faith and Credit Act, requires a federal district court to give the same – not more and not less – preclusive effect to a state court decision as that judgment would have in the state courts of the state in which it was rendered. *Kremer v. Chemical Construction Corp.*, 456 U.S. 461, 466 (1982). This Court has never construed the *Rooker-Feldman* doctrine to give *greater* preclusive effect to a state court judgment in federal court than the judgment would have under § 1738. Indeed, such a construction directly conflicts with § 1738. *See Matsushita*, 516 U.S. at 373.

The Fifth Circuit argues, however, that

> [t]he *Cox* court's findings that allow for certification are 'inextricably intertwined' with Richard's constitutional challenge to the state's compliance with due process requirements. A federal court

> cannot examine the due process deficiencies in *Cox* without disturbing the underlying judgment.

(App. 11.)

This construction of the doctrine gives rise to a classic Catch-22.[7] If a state court used constitutionally defective procedures to approve the settlement, then absent class members, such as Petitioners, are not subject to its jurisdiction or bound by its judgment. But determining whether a state court had jurisdiction, or used defective procedure in a class action, requires a district court to look at that procedure, as it does in other situations requiring full faith and credit. This is particularly true when the procedure at issue is plainly irregular, like *Cox's ex parte* class certification. Nevertheless, the Fifth Circuit reasoned that:

> In class action suits, the findings related to procedural due process determine class size, which ultimately affects the final judgment. The findings directly affect the substantive outcome, so challenging them would seem to conflict with the *Rooker-Feldman* doctrine. Here, Richard's allegations indisputably denounce the express findings of the *Cox* state court. Because his challenge would result in setting aside a state court judgment, *Rooker-Feldman* seems to bar federal review of these findings.

(App. 10.)

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[7] *See* JOSEPH HELLER, CATCH-22, 47 (Dell Publishing Co. 1985) ("There was only one catch and that was Catch-22. . . . Orr was crazy and could be grounded. All he had to do was ask; as soon as he did, he would no longer be crazy and would have to fly more missions. He would be crazy to fly more missions and sane if he didn't, but if he was sane he had to fly them. Yossarian was moved very deeply by the absolute simplicity [of Catch-22].")

In short, the Fifth Circuit – in conflict with its sister circuits – here construes the *Rooker-Feldman* doctrine so broadly that it conflicts with the rule under § 1738 requiring federal courts to follow state preclusion rules. Its decision creates a split in the circuits on the extent to which the doctrine requires that district courts avoid entertaining collateral attacks on state court judgments under *any* circumstances, even if it means subjecting individuals to judgments obtained without notice, adequate representation, proper jurisdiction, or other constitutionally mandated procedural safeguards. The Fifth Circuit's decision is breathtaking in its implication for the jurisdiction of federal courts to protect constitutional rights.[8]

The Fifth Circuit decision sets up a false dichotomy between *Shutts* and *Rooker-Feldman*. The dichotomy is false because it ignores that under the Supremacy Clause, Tennessee courts are obligated to apply *Shutts*. Under these facts, they could not give *Cox* preclusive effect as to the claims of an absent class member. *See Shutts*, 472 U.S. 797. Because *Shutts* requires enforcement of constitutional due process in *all* class actions – in both state and federal fora – requiring its application does not violate *Rooker-Feldman*. Federal courts engaging in the analysis required by *Shutts* are not reviewing the substance of the original judgment, but rather applying the analysis that *Shutts*

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[8] Most Circuits that have addressed the issue have held that when plaintiffs were denied a reasonable opportunity to raise their federal claims in a state proceeding, they may bring them in district court. *See, e.g., Simes v. Huckabee*, 354 F.3d 823, 827 (8th Cir. 2003) and cases cited therein.

requires of *every* court in subsequent actions asserted by absent class members.[9] Before *Cox* can bar the claims of absent class members, a court – whether a federal district court or a state court – must conduct the analysis required by *Shutts* and *Amchem Prod., Inc. v. Winsor*, 521 U.S. 591, 621 (1997).[10]

This procedural analysis does not constitute the review prohibited by *Rooker-Feldman*: "A Court conducting an action cannot determine the *res judicata* effect of the judgment; that effect can only be tested in a subsequent action." *Matsushita*, 516 U.S. at 396.[11] Because such analysis achieves procedural due process, not a substantive review, *Rooker-Feldman* is not implicated. *See, e.g., Catz v. Chalker*, 142 F.3d 279, 294-95 (9th Cir. 1998) (procedural due process challenge to actions of state court

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[9] Tenn. R. Civ. P. 23.05 is indistinguishable from Fed. R. Civ. P. 23(e).

[10] Justice Ginsberg recognized this in her concurring opinion in *Matsushita*:

> Every state law on the preclusiveness of judgments is pervasively affected by the supreme law of the land. To be valid in the rendition forum, and entitled to recognition nationally, a state court's judgment must measure up to the requirements of the Fourteenth Amendment's Due Process Clause. 'A State may not grant preclusive effect in its own courts to a constitutionally infirm judgment, and other state and federal courts are not required to accord full faith and credit to such a judgment.'

516 U.S. at 395 (citation omitted).

[11] In holding that no procedural due process exception exists to *Rooker-Feldman*, the opinion followed *Liedtke*, which was not a class action case and could not provide a basis to ignore *Shutts*. *See Liedtke v. State Bar of Texas*, 18 F.3d 315, 317-18 (5th Cir. 1994).

. . . would "not contravene the heart of the *Rooker-Feldman* doctrine, the prohibition of reviewing the substance of state court judgments").[12] Thus, another conflict is presented.

B. The Fifth Circuit Decision Conflicts With Decisions Of The Ninth, Eighth And Seventh Circuits Which Hold That When A Federal Plaintiff's Injury Is Caused By An Adverse Party Or Fraud, Arises From Procedural Rather Than Substantive Challenge To The State Court Decision, Or Involves A Non-Party or Parties Denied Reasonable Opportunity To Raise Their Claims In The State Action, Then *Rooker-Feldman* Does Not Bar Jurisdiction, Even If The Claim Denies A Legal Conclusion Reached By the State Court.

In *Noel v. Hall*, 341 F.3d 1148 (9th Cir. 2003), the Ninth Circuit held that where the plaintiff complains of a legal injury caused by an adverse party – *i.e.*, in this matter, the damage to Petitioners' home caused by PB

[12] The Fifth Circuit's failure to analyze whether a Tennessee court would give *Cox* preclusive effect is compounded by its mischaracterizing Petitioners' § 1983 claim as a groundless effort to circumvent *Rooker-Feldman*. (App. 15.) No § 1983 claim is merely a gimmick when it accords with Fifth Circuit precedent and relies on constitutional violations that, under *Shutts* and *Amchem*, prohibit Tennessee courts from giving the *Cox* judgment preclusive effect against absent class members such as Petitioners. Similarly, the state action requirement that the Fifth Circuit finds lacking in Petitioners' § 1983 claim is *not* required under the *Shutts* analysis. The *Cox* court's failure to comply with *Shutts* bars the preclusive effect of the judgment *without regard to whether Respondents were state actors.*

plumbing – *Rooker-Feldman* does *not* bar jurisdiction, as it would if the legal injury were caused by the state judgment itself. If the federal plaintiff, and the adverse party have already litigated the state court suit to judgment, the federal plaintiff may, of course, be *precluded* from relitigating the dispute under 28 U.S.C. § 1738. *Noel*, 341 F.3d at 1163-64. The relevant state law determines who prevails under preclusion doctrine, not *Rooker-Feldman*. The Fifth Circuit is in conflict with *Noel*.

Applying *Noel*, the Ninth Circuit finds that cases raising allegations of extrinsic fraud on the state court should not be dismissed under *Rooker-Feldman*, but instead require district courts to examine the plaintiff's allegations and determine whether the claims are precluded under state law. *Kougasian v. More*, 359 F.3d 1136, 1140-41 (9th Cir. 2004) (when "a federal plaintiff asserts as a legal wrong an allegedly illegal act or omission by an adverse party, *Rooker-Feldman* does not bar jurisdiction."). Here, too, Fifth Circuit's decision is in conflict with *Kougasian*. These cases illustrate the Ninth Circuit's sound grasp of the interplay between preclusion doctrine and *Rooker-Feldman*. By contrast, they emphasize the confusion displayed by the Fifth Circuit.[13]

[13] A recent decision of the Third Circuit attempts to parse the distinctions between *Rooker-Feldman* and preclusion. *See ITT Corp. v. Intelnet Int'l Corp.*, 2004 U.S. App. LEXIS 8168 (April 26, 2004). The very complexity of its analysis shows the need for intervention by this Court to clarify the law, which the Third Circuit observes is "pinched indeed." *Id.* *7. The Court notes that the two doctrines are "potentially misleading because of [their] close relationship." *Id.* at *11.

In the Seventh Circuit, Judge Easterbrook, with his usual precision of language, drew the distinction well in *GASH Associates v. Village of Rosemont*, 995 F.2d 726, 728-29 (7th Cir. 1993):

> Preclusion in federal litigation following a judgment in state court depends on the Full Faith and Credit Statute, 28 U.S.C. § 1738, which requires the federal court to give the judgment the same effect as the rendering state would. . . . The *Rooker-Feldman* doctrine, by contrast, has nothing to do with § 1738. It rest on the principle that district courts have only original jurisdiction. . . . The *Rooker-Feldman* doctrine asks: is the federal plaintiff seeking to set aside a state judgment or does he present some independent claim, albeit one that denies a legal conclusion that a state court has reached in a case to which he was a party?

Id., 995 F.2d 728-29.

Petitioners' claim is against Respondents for damages to his home resulting from fraudulent marketing of their product. In brief, Petitioners are not seeking to invalidate the state judgment for those who – unlike himself – were parties to it. He is trying to establish that because of fraud against the state court and resulting procedural deficiencies, he is free to pursue his independent claims for damages against Respondents in federal court.

The Ninth Circuit distinguishes between plaintiffs seeking to set aside state judgments because of their substance from those challenging the state court's procedure. *Catz v. Chalker*, 142 F.3d 279, 294 (9th Cir. 1989). *Catz* holds that when a plaintiff challenges procedure

rather than merits, his claim is not "inextricably intertwined" with the state court judgment; thus, it is not precluded by the *Rooker-Feldman* doctrine. *Catz* is, therefore, in conflict with the Fifth Circuit.

The Eighth Circuit's analysis is that the majority rule among Courts of Appeals is that "not every federal claim which would cast doubt on a state court judgment is barred by *Rooker-Feldman* . . . [if] . . . federal plaintiffs have not been given a *reasonable* opportunity to raise their federal claims in the state proceeding." *Simes v. Huckabee*, 354 F.3d 823 (8th Cir. 2003) (emphasis added), citing decisions from the Second, Fourth, Seventh and Eleventh Circuits. Petitioners have not received any opportunity whatsoever to raise his federal claims in any court. The conflict established by the Fifth Circuit decision requires resolution by this Court.

The error of the Fifth Circuit's decision and its conflict with settled law in the other circuits is also brought out by the unquestioned proposition that the *Rooker-Feldman* doctrine

> . . . does not defeat jurisdiction when a nonparty brings the action, even though the decision may involve matters inextricably intertwined with a state court judgment . . . a nonparty to the state action can invoke federal jurisdiction free of the *Rooker-Feldman* bar, even to permit a direct attack on a state judgment.

18(b) CHARLES ALLEN WRIGHT & ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE & PROCEDURE § 4469.1 at 133-36 (2002); *accord, Johnson v. DeGrandy*, 512 U.S. 997, 1006 (1994).

This general rule is reflected in the Seventh Circuit's decision in *Allen v. Allen*, 48 F.3d 259, 261 (7th Cir. 1995), which holds that *Rooker-Feldman* does not bar federal jurisdiction because it "extends only to parties . . . while specifically leaving non-parties free to pursue their claims." *Allen* cannot be squared with the decision of the Fifth Circuit.

The issue of whether Petitioners were a "party" to *Cox* depends on whether the state court obtained jurisdiction over absent class members by applying procedural rules mandated by Tennessee law *and* the Constitution. As Judge Easterbrook observed in his now classic dissent in another decision:

> When *Hansberry v. Lee*, 311 U.S. 32 (1940) held that a judgment rendered without personal jurisdiction over members of the class is not entitled to full faith and credit, the Justices did not add: "Except in federal court." . . . It gets the cart before the horse to reject, as barred by a judgment, an effort by the absent class members to show that they were not properly brought into the state case and therefore are not affected by the judgment. . . . [A] judgment that is not entitled to full faith and credit does not acquire extra force via the *Rooker-Feldman* doctrine.

Kamilewicz v. Bank of Boston Corp., 100 F.3d 1348, 1350-52 (7th Cir. 1996) (Easterbrook, J., dissenting from denial of rehearing *en banc*).

II. The Fifth Circuit Decision Conflicts With Decisions Of Other Circuits In Holding That The Facts Here Do Not Establish State Action.

Petitioners' principal argument supporting their 42 U.S.C. § 1983 claim is that the requisite "state action" may be found under the "innocent agent" doctrine, which holds that one who "causes the commission of an indispensable element of the offense by an innocent agent . . . is guilty as a principal." *See United States v. Gabriel*, 125 F.3d 89, 99 (2d Cir. 1997) (*citing United States v. Concepcion*, 983 F.2d 369, 383 (2d Cir. 1992)).

The "innocent agent" here, on one theory of the litigation, was the state court judge. Corrupt class counsel willfully deceived and manipulated the judge into approving a collusive settlement; as such, they become state actors. Persons who cause another to commit a crime or tort are held responsible as principals, even though the agent who actually commits the act is innocent, and the person who causes the offense lacks the capacity to commit the offense himself. *See* 18 U.S.C. § 2(b), which codifies the principle for federal criminal law. The Fifth Circuit, too, recognizes the principle. *See, e.g., United States v. Smith*, 584 F.2d 731, 734 (5th Cir. 1978). The rule is also illustrated by *Lester*, 363 F.2d at 72, noted above. The statute at issue in *Lester* was 18 U.S.C. § 242, the criminal analogue of § 1983, where the color-of-state-law requirement is read "coextensively." *Dennis*, 449 U.S. at 29 n.5 (1980). Thus, the Fifth Circuit conflicts with *Lester* and *Rashwan*, noted above.

A second theory offered by Petitioners for the presence of the "state action" required by their civil rights claim was equally straightforward, but rejected by the Fifth Circuit. Approval of a settlement by a state court constitutes "state

action." Both Tennessee law, which requires notice to all class members before a class action is compromised, Tenn. R. Civ. P. 23.05, and constitutional due process, *Shutts*, 472 U.S. at 797, were, therefore, violated by the *Cox* settlement. *See Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 848 (1999). Petitioners, too, can prove facts consistent with their allegations of judicial or other malfeasance under *Conley v. Gibson*, 355 U.S. 41, 48 (1957), *reaffirmed in, Swierkiewicz, N.A. v. Sorema*, 534 U.S. 506, 512 (2002). Other circuits, but not the Fifth, are following *Conley/Swierkiewicz*.[14] Hence, another conflict is presented. Petitioners, moreover, would have been permitted under these decisions to offer the evidence to support their theories. In the Ninth Circuit, for example, Petitioners would be entitled to relief if they proved that the *Cox* class counsel accepted payments to act contrary to the best interests of absent class members or colluded with Respondents to misrepresent and omit material facts. *See, e.g., Epstein v. MCA, Inc.*, 126 F.3d 1235 (9th Cir. 1997) (absent class members can litigate the issue of adequacy of representation in subsequent federal actions). Because *Epstein* cannot be squared with the Fifth's decision, a conflict exists. In addition, this fact pattern is the precise scenario recognized in *Amchem* when this Court posited that parties "may even put one over on the court, in a

[14] *See, e.g., Garrett v. Tandy Corp.*, 295 F.3d 94, 105 (1st Cir. 2002) ("[I]t is enough for a plaintiff to sketch a scenario which, if subsequently fleshed out by a means of appropriate facts, could support an actionable claim.") (citing *Sorema*, 534 U.S. at 513); *accord, Gorski v. New Hampshire Dept. of Corrections*, 290 F.3d 466, 473 (1st Cir. 2002) (citing *Sorema*, 534 U.S. at 513). *See also Lee v. City of Los Angeles*, 250 F.3d 668, 679 (9th Cir. 2001).

staged performance." *Amchem Prod., Inc.*, 521 U.S. at 621. The Fifth Circuit has, in short, reneged on the implicit promise of *Amchem*.

III. The Availability Of Private Equity Relief In RICO Cases Is In Conflict Among The Circuits; The Fifth Circuit's Application Of The Disgorgement Remedy In RICO Cases Conflicts With The Second Circuit's And Not Permitting Petitioners To Amend Their Pleadings Conflicts With The General Approach Of The Circuit Courts.

In the litigation below, Petitioners sought to certify a settlement class, not on a *legal* damages theory, that is, out of pocket losses *by the victims*, which might cause unique individual issues to predominate, thus precluding the certification of the class, but on an *equitable* disgorgement theory. Petitioners argue that profits realized *by the perpetrators* entail no unique individual issues that might predominate, and therefore a disgorgement remedy would not preclude the certification of the class. The District Court rejected the theory, as did the Circuit Court.

The issue of the availability of private equity relief reflects a split in the circuits, as this Court recognized when it granted certiorari to resolve it in *NOW v. Scheidler*, 267 F.3d 687, 697-98 (7th Cir. 2001), *cert. granted on issue, but rev'd on other grounds*, 537 U.S. 393, 397 (2003). This Petition, therefore, presents this conflict anew.

The Fifth Circuit decision assumed, but did not decide, that private parties can obtain equity relief, including disgorgement. The opinion, however, so twisted

the decision it purported to follow (*United States v. Carson*, 52 F.3d 1173 (2d Cir. 1995)) that its result is in conflict with it. In *Carson*, the Second Circuit concluded that disgorgement is available in civil RICO actions, but only for future conduct.[15] The Fifth Circuit's narrow interpretation of *Carson*, however, cannot be squared with *Carson*'s holding or its rationale. In *Carson*, the defendant was a retired union official and the Second Circuit could

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[15] Petitioners are prepared to argue that *Carson* itself is wrongly decided. For present purposes, he only argues that the Fifth Circuit's decision is in conflict with *Carson*. Discussion of the validity of *Carson* itself may be left to the brief on the merits. That argument would proceed first by turning to RICO's language. Contrary to the analysis of *Carson*, "prevent and restrain" is not part of a series from which another word is omitted, but a common law couplet that merely means "equity relief." *See* HENRY WEIHOFFEN, LEGAL WRITING STYLE 50 (1961) (common law couplets, two words meaning the same thing, reflect a time when the principles of law were written with synonymies, one in French and the other in Anglo-Saxon, since it governed two people each speaking its own language). The precise language was taken from the antitrust statutes, *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258, 267-68 (1992), where it merely incorporates "the general principles which govern the granting of equitable relief. . . ." *DeBeers Consol. Mines Ltd. v. United States*, 325 U.S. 212, 218 (1945). Disgorgement is a general equitable remedy. *Porter v. Warner Holding Co.*, 328 U.S. 395, 397-99 (1946). Disgorgement is an appropriate remedy under RICO. *United States v. Private Sanitation Industry Ass'n*, 44 F.3d 1082, 1084 (2d Cir.), *cert. denied sub nom. Ferrante v. United States*, 516 U.S. 806 (1995). The purpose of disgorgement is to deprive violators of their ill-gotten gains and to deter violations of the law, individually and generally. *SEC v. First Jersey Sec., Inc.*, 101 F.3d at 1474; *Federal Trade Commission v. Gem Merchandising Corp.*, 87 F.3d 466, 469 (11th Cir. 1996); *Commodity Futures Trading Comm'n v. British Am. Commodity Options Corp.*, 788 F.2d 92, 94 (2d Cir. 1986). In addition, "it is simple equity that a wrongdoer should disgorge his fraudulent enrichment." *Janigan v. Taylor*, 344 F.2d 781, 786 (1st Cir.), *cert. denied*, 382 U.S. 879 (1965). No linguistic or policy reasons explain why RICO disgorgement should be treated differently.

not see any future-oriented purpose in requiring him to disgorge the fruits of his embezzlement. In sharp contrast, here the perpetrators are big corporations, perpetual in duration and constantly obtaining new revenue. Unlike individual wrongdoers, these defendants will neither retire nor fade away.[16] Without an order requiring them to disgorge their illicit profits, they will remain undeterred and capable of repeating their misconduct through any of the myriad of other chemical products they sell. *In any event, all of this is a matter of proof, not pleading, and Petitioners ought to be entitled to offer proof to support their theories. These matters cannot be decided on the pleadings.* By doing so, the Fifth Circuit not only departed from good pleading standards, but from the holding and rationale of *Carson*.

Nor is it consistent with *Carson* to deny Petitioners relief because the ill-gotten gains were obtained long ago. Respondents engaged in additional misconduct for the purpose of delaying and frustrating Petitioners' ability to obtain relief. As the dissent here correctly observes, the Fifth Circuit's opinion elevates form over substance. It allows wrongdoers to evade responsibility by simply discontinuing an offending product or performing cosmetic modification.[17]

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[16] *See United States v. Private Sanitation Indus Ass'n*, 914 F. Supp. 895, 901 (E.D. N.Y. 1996) (*Carson*, though controlling, distinguished: "Because the corporate defendants in this case will continue to be involved in the Long Island carting industry even if the government's requested relief is granted, the monies these corporations gained illegally obviously constitute capital available for the purpose of funding or promoting illegal conduct.").

[17] In fact, if *Carson*, as interpreted by the Fifth Circuit, is good law, it spells trouble for the Government's civil RICO litigation against the

(Continued on following page)

Finally, Petitioners should have been allowed to amend their complaint. It is unfair to condemn Petitioners because they "fail[] to argue that such disgorgement would 'prevent and restrain' similar RICO violations in the future" (App. 17), when no such requirement existed previously and the new requirement could be satisfied easily by amendment. This, too, is a matter on which the Circuit stands in conflict with the other circuits.[18]

To permit the issue of RICO equity relief, in particular disgorgement, to fester in the circuits is not fair to litigants in the different circuits. Motions to transfer will have as their real reason, not "the correct" or a "more convenient" forum, but to obtain a more favorable circuit law.[19] RICO's effectiveness as a guarantor of integrity of

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tobacco industry, which is premised *solely* on a theory of disgorgement of the illicit profits the industry made selling death-inflicting and addicting cigarettes to underage children, conduct prohibited in all 50 states, in brief, the Government faces the argument, as here, that the industry is "reformed," that is, "trust us not to recidivate," and so no justification can be offered to require it to disgorge its substantial, past illicit gains. *See United States v. Philip Morris, Inc.*, 116 F. Supp. 2d 131, 151-52 (D.C. D.C. 2000). As the dissent here also correctly notes, even if Respondents are out of the PB business, they are publicly traded corporations and subject to being deterred by the loss of profits obtained through misconduct. Failing to require disgorgement when malefactors shift their misconduct from one product to another, only encourages such evasions.

[18] *See, e.g., Branch v. Tunnell*, 937 F.2d 1382, 1388 (9th Cir. 1991) (directing district court to let plaintiffs amend in light of newly adopted pleading standard); *Pross v. Katz*, 784 F.2d 455, 459-60 (2d Cir. 1986) (remanding so that plaintiff could amend to satisfy new pleading requirement).

[19] *See Tel-Phonics Services, Inc. v. TBS Int'l, Inc.*, 975 F.2d 1134, 1138 (5th Cir. 1992) (RICO; the law of the transferee circuit applied).

the country's national marketplace,[20] an issue sadly in the headlines every day in the context of corporate fraud,[21] is undermined.

If RICO's power to do equity is to be limited, as attempted here by the Fifth Circuit, that reform ought to come from Congress. *H. J., Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229, 249 (1989).[22] Congress, the proper body, has *not* enacted *general* limitations on RICO's enforcement powers. That ought to end the matter, absent constitutional considerations. *United States v. Turkette*, 452 U.S. 576, 587 (1981). Justice Cardozo put it well: "[A court's] duty is done when . . . [it] enforce[s] the law as it is written." *Techt v. Hughes*, 229 N.Y. 222, 228-29, 128 N. E. 185, 186 (1920), *cert. denied*, 254 U.S. 643 (1920).

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[20] "There are three possible kinds of force which a firm can resort to: violence (or threat of it), deception, or market power." CARL KAYSEN et al., ANTITRUST POLICY 17 (1959). Anti-trust focuses on the third, criminally and civilly; RICO focuses on the first and second, criminally and civilly. Together, they seek a market place characterized by integrity, fiscal and physical.

[21] The litany of major company names in the news is dizzying. *See, e.g., The Economist*, June 28, 2003 (Enron, WorldCom, Tyco, Adelphia, HealthSouth, Imcone, Global Crossing, etc.) ("[T]he basic task is to insure that existing laws are vigorously enforced and that any loopholes in them are closed. . . .").

[22] Congress still sits; it can – as it has – amend RICO. *See, e.g.*, the Private Securities Litigation Reform Act of 1995, Pub. L. 104-67, § 107, *amending* 18 U.S.C. § 1964(c) (conduct actionable as securities fraud may not be grounds for recovery under RICO).

CONCLUSION

For all of these reasons, Petitioners respectfully request this Court to grant the Petition.

Respectfully submitted,

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2003 WL 22977497

United States Court of Appeals,
Fifth Circuit.

Richard R. **RICHARD**, Jr., on behalf of himself and all others similarly situated, Plaintiff-Appellant,

v.

HOECHST **CELANESE** CHEMICAL GROUP, INC., Hoechst **Celanese** Chemical Group; Shell Oil Company, doing business as Shell Chemical Company; Hoechst **Celanese** Corporation, Hoechst **Celanese** Corporation; E.I. DuPont De Nemours and Company, Defendants-Appellees.

No. 02-41377

Dec. 19, 2003.

Wiener, Circuit Judge, filed opinion concurring in part and dissenting in part.

Mitchell A. Toups, Weller, Green, Toups & Terrell, Beaumont, TX, Arthur R. Miller (argued), Harvard University School of Law, Cambridge, MA, Damon Michael Young, Sr., Young, Pickett & Lee, Texarkana, TX, George Robert Blakey (argued), Notre Dame Law School, Notre Dame, IN, for Plaintiff-Appellant.

Paul M. O'Connor (argued), Seth Alan Moskowitz, Kasowitz, Benson, Torres & Friedman, New York City, Jerry Lamar Mitchell, James W. Bartlett, Jr., Kasowitz, Benson, Torres & Friedman, Houston, TX, for Hoechst Celanese Chemical Group and Hoechst Celanese Corp.

David T. Harvin (argued), Erica Lee Krennerich, Vinson & Elkins, Houston, TX, for Shell Oil Co.

Kathleen Taylor Sooy (argued), Luther Zeigler, Crowell & Moring, Washington, DC, Jim C. Ezer, Schirrmeister Ajamie, Houston, TX, for E. I. DuPont De Nemours & Co.

Appeal from the United States District Court for the Eastern District of Texas.

Before WIENER, CLEMENT, and PRADO, Circuit Judges.

CLEMENT, Circuit Judge:

This case arises from a class action lawsuit brought by **Richard** R. **Richard** ("**Richard**"), on behalf of himself and a putative class consisting of parties who allegedly suffered damages from inherently defective polybutylene ("PB") plumbing systems installed in their homes. **Richard** alleges that Hoechst **Celanese** Chemical Group, Hoechst **Celanese** Corporation (collectively "Hoechst"), Shell Oil Company ("Shell"), and E.I. DuPont Nemours ("DuPont") caused the putative class's injuries through their manufacture, promotion, and sale of PB for use in residential and commercial plumbing systems. **Richard** appeals the district court's dismissal of his class action lawsuit for lack of subject matter jurisdiction with regard to his 42 U.S.C. § 1983 due process claim, and dismissal for failure to state a claim upon which relief can be granted with regard to his RICO claims.

I. FACTS AND PROCEEDINGS

Richard owns and lives in a mobile home with a PB plumbing system. Over time, the leaks from the PB plumbing system have caused substantial damage to

Richard's mobile home. Richard contends that the PB plumbing system is inherently defective.

PB is a by-product of oil refining. Shell, the exclusive seller of PB resin in the late 1970's, developed flexible PB pipes, which other companies like DuPont and Hoechst manufactured. DuPont and Hoechst also used PB resin to develop raw materials for joint fittings in PB plumbing systems.

A. Richard's Allegations

Richard alleges that Shell, DuPont, and Hoechst (collectively the "Appellees") administered a complex scheme to mislead buyers into believing that PB plumbing systems were suitable for use as potable water distribution systems. To this end, the Appellees allegedly claimed that PB plumbing systems were superior to copper plumbing systems based on their representations that PB systems were lightweight, inexpensive, better able to withstand freezing temperatures, easier to install and purportedly enjoyed a lifetime of 50 years. According to Richard, the Appellees knew that these representations were untrue because their scientists allegedly reported that the PB plumbing systems would degrade even when exposed to low concentrations of chlorine typically found in municipal water systems. Richard claims that in spite of this knowledge, the Appellees concealed the information and continued to market these products until approximately 1996.

Richard further claims that before purchasing his mobile home in 1997, he inquired about its plumbing system. The seller informed him that the mobile home was equipped with an exceptionally reliable PB plumbing system that would likely outlast the mobile home itself.

According to Richard, the seller unwittingly made this misrepresentation in reliance on the promotional materials that the Appellees promulgated. Taking these misrepresentations into consideration, Richard purchased the home.

B. The Cox and Spencer Class Action Settlements

The defective PB plumbing systems caused considerable litigation. In 1994, a group of plaintiffs reached a class action settlement in a Texas state court with the Appellees, but the Texas court rejected the settlement. *Beeman v. Shell Oil Co.,* No. 93-047363 (Dist. Ct., Harris County, Tex.). In the meantime, other plaintiffs filed separate PB class actions in Alabama state court and Tennessee state court. *Spencer v. Shell Oil Co.,* No. CV94-074 (Cir. Ct., Greene County, Ala.); *Cox v. Shell Oil Co.,* No. 18,844, 1995 WL 775363 (Tenn.Chanc. Ct., Obion County, Nov. 17, 1995). In 1995, the Appellees entered into a class action settlement in *Cox.* The Tennessee state court approved a national settlement, which required Shell and Hoechst to contribute $950 million to replace eligible consumers' leaking PB plumbing systems and to reimburse them for the property damage which the leaks had caused. In *Spencer,* the Alabama state court approved a class action settlement that required DuPont to contribute further sums toward the repair and replacement of PB plumbing systems.

C. Proceedings in the Present Action

Richard filed his Original Class Action Complaint in the Eastern District of Texas on January 10, 2000, on behalf of himself and a class of similarly situated persons

pursuant to Federal Rule of Civil Procedure Rule 23. In his Second Amended Complaint, he defined the Class as follows:

> All Texas citizens, residents and entities authorised [sic] to do business in Texas that own plumbing systems in structures in Texas and elsewhere, in which there is polybutylene plumbing and over which Tennessee and Alabama courts lacked subject matter jurisdiction.
>
> All U.S. citizens and entities that were excluded from the settlement classes of *Cox v. Shell Oil Co.*, No. 18,844, 1995 WL 775363 (Tenn. Chanc. Ct., Obion City) and *Spencer v. Shell Oil Co.*, No. CV94-074 (Greene Cty., Ala.) because defects in their polybutylene plumbing systems were defined as non-qualifying.
>
> All U.S. citizens and entities that own structures containing polybutylene plumbing systems and have never participated in a polybutylene class action in a court of competent personal and subject matter jurisdiction.

Richard claimed that the Appellees were liable for the damages that he and the class members sustained as a result of the leaks in their PB plumbing systems. The complaint cited theories of conspiracy, strict liability, negligence, and breach of implied warranties. Richard also asserted that the Appellees violated his due process rights, giving rise to a cause of action under 42 U.S.C. § 1983. He based this assertion on his allegation that the Appellees and class counsel in *Cox* colluded in setting up procedural safeguards for class member certification. Richard also alleged that as an absent class member of the *Cox* and *Spencer* suits, he did not receive adequate notice, had no opportunity to opt-out, and did not receive adequate

representation. Finally, Richard amended his complaint to include claims under 18 U.S.C. § 1962(a) of the RICO Act.

On May 25, 2001, Richard and DuPont reached an agreement and jointly moved for preliminary class certification as to DuPont only, and for preliminary approval of a settlement agreement. Shell and Hoechst opposed the motion. On March 30, 2002, the district court issued its memorandum and opinion, holding that: (1) the court did not have jurisdiction over Richard's § 1983 claim because of the *Rooker-Feldman* doctrine; (2) the court had subject matter jurisdiction over the federal RICO claims, but those claims failed to state a claim upon which the court could grant relief under Federal Rule of Civil Procedure 12(b)(6); and (3) Richard did not satisfy requirements for class certification.

Richard timely appeals the district court's dismissal of his claims for lack of subject matter jurisdiction and failure to state a claim under Rule 12(b)(6).

II. STANDARD OF REVIEW

We review *de novo* a district court's dismissal of a claim for lack of subject matter jurisdiction. *Atlas Global Group, L.P. v. Grupo Dataflux,* 312 F.3d 168, 170 (5th Cir.2002). We also review *de novo* a district court's dismissal of a claim pursuant to Federal Rule of Civil Procedure 12(b)(6). *Herrmann Holdings, Ltd. v. Lucent Techs., Inc.,* 302 F.3d 552, 557 (5th Cir.2002).

III. DISCUSSION

Richard raises two issues on appeal. First, Richard argues that the district court erred in finding that the

Rooker-Feldman doctrine bars consideration of his 42 U.S.C. § 1983 due process claim. He claims that because *Rooker-Feldman* is consistent with principles of full faith and credit, this Court cannot apply *Rooker-Feldman* to bar a claim challenging a judgment allegedly reached without constitutionally sufficient procedural safeguards. Second, he contends that the district court erred in dismissing his RICO claim because it erroneously construed 18 U.S.C. § 1964 to preclude equitable remedies for private plaintiffs. We address these arguments in turn.

A. Richard's § 1983 Claim

In *Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 44 S.Ct. 149, 68 L.Ed. 362 (1923), and *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 103 S.Ct. 1303, 75 L.Ed.2d 206 (1983), the Supreme Court held that state courts must resolve constitutional questions that arise during their proceedings. If the state trial court errs in deciding the constitutional issues, the judgment is not void, but the appropriate state appellate court must correct it. *Rooker*, 263 U.S. at 416, 44 S.Ct. 149. Any subsequent recourse to federal court is limited to an application for a writ of certiorari to the United States Supreme Court. *Id.* Consequently, lower federal courts lack jurisdiction to review state court judgments when the constitutional claims are "inextricably intertwined" with the challenged state court judgment. *Feldman*, 460 U.S. at 483 n. 16, 103 S.Ct. 1303.

Our sister circuits have applied the *Rooker-Feldman* doctrine to hold that a federal court does not have jurisdiction over a class action suit that a state court has already adjudicated, even where an absent class member alleges

procedural due process violations. *Kamilewicz v. Bank of Boston Corp.*, 92 F.3d 506, 510-11 (7th Cir.1996); *Snider v. City of Excelsior Springs, Mo.*, 154 F.3d 809, 812 (8th Cir.1998). In *Kamilewicz*, the plaintiffs argued that *Rooker-Feldman* should not apply to an Alabama state court judgment because the Alabama court did not comply with the procedural safeguards necessary for exercising personal jurisdiction over absent class members. *Kamilewicz*, 92 F.3d at 509. Despite alleging these deficiencies, the plaintiffs also claimed that they did not seek to overturn the Alabama judgment. *Id.* The Seventh Circuit found these positions to be in conflict, and reasoned that the plaintiffs merely sought to set aside a state court judgment. *Id.* at 510. Because the plaintiffs did not present an independent claim, the court applied *Rooker-Feldman*. *Id.*

In *Snider*, absent class members of a state court class action suit alleged that they never received proper notice, and that as a result, they were never parties to the litigation. 154 F.3d at 812. Because they did not receive notice, the absent class members argued that *Rooker-Feldman* should not apply. *Id.* The court, however, did not agree. *Id.* According to the Eighth Circuit, if the federal court found that the absent class members were not parties, then the federal court would have to find that the state court wrongly certified the class and wrongly ordered a final judgment. *Id.* Such a holding would create a procedural due process exception to the *Rooker-Feldman* doctrine, but no such exception exists. *Id.*, *accord Liedtke v. State Bar of Texas*, 18 F.3d 315, 317 (5th Cir.1994) (refusing to find a due process exception to *Rooker-Feldman*).

While we find this reasoning persuasive, we also recognize that the *Rooker-Feldman* doctrine only applies

insofar as a state court judgment merits full faith and credit. *Matsushita Elec. Indus. Co., Ltd. v. Epstein,* 516 U.S. 367, 373, 116 S.Ct. 873, 134 L.Ed.2d 6 (1996) (stating that a federal court must give preclusive effect to a state court judgment only to the extent that the law of the state would give preclusive effect to the judgment); *In re Lease Oil Antitrust Litigation,* 200 F.3d 317, 319 n. 1, 320 (5th Cir.2000) (noting that the *Rooker-Feldman* doctrine is consistent with the Full Faith and Credit Act, 28 U.S.C. § 1783); *Gauthier v. Continental Diving Services,* 831 F.2d 559, 561 (5th Cir.1987) (declining to apply the *Rooker-Feldman* doctrine because doing so would require the federal court to give greater deference to a state court judgment than that state's courts would give the judgment); *Kamilewicz v. Bank of Boston Corp.,* 100 F.3d 1348 (7th Cir.1996) (Easterbrook, J., dissenting on request for rehearing en banc). Federal jurisdiction is therefore proper under *Rooker-Feldman* if the state law does not provide preclusive effect to the state court judgment.

In a class action lawsuit, a court may exercise jurisdiction over absent class members only if the court follows certain due process procedures. *Phillips Petroleum Co. v. Shutts,* 472 U.S. 797, 811-12, 105 S.Ct. 2965, 86 L.Ed.2d 628 (1985). A court must ensure that class members have received adequate notice, representation, and an opportunity to opt-out. *Id.* at 812, 105 S.Ct. 2965. The settlement judgment has no preclusive effect if the court does not comply with these procedures. *Id.* at 805, 105 S.Ct. 2965. Thus, to merit full faith and credit, a state must adhere to the due process guidelines of *Shutts.*

In light of *Shutts,* it would seem that *Rooker-Feldman* does not apply where a state court has not followed the due process requirements for class certification. In the

instant case, Richard attempts to escape the reach of *Rooker-Feldman* by alleging such procedural infirmities. He argues that as a result of the due process deficiencies, the *Cox* state court did not properly exercise jurisdiction over him.

Given the class action nature of this case, it is necessary to resolve the following tension in applying *Rooker-Feldman*. On the one hand, federal courts can examine jurisdictional matters brought before them. If the absent class members were not subject to the state court's jurisdiction or bound by its judgment, then federal courts would have jurisdiction over the absent class members' federal claims. Richard's jurisdictional allegations would thus seem to require a federal court to review whether federal jurisdiction exists, which would necessitate reviewing the disputed findings in *Cox*.

On the other hand, *Rooker-Feldman* prohibits federal review of substantive state court findings. *Rooker*, 263 U.S. at 416, 44 S.Ct. 149. In class action suits, the findings related to procedural due process determine class size, which ultimately affects the final judgment. The findings directly affect the substantive outcome, so challenging them would seem to conflict with the *Rooker-Feldman* doctrine. Here, Richard's allegations indisputably denounce the express findings of the *Cox* state court. Because his challenge would result in setting aside a state court judgment, *Rooker-Feldman* seems to bar federal review of these findings.

Reconciling these seemingly conflicting positions requires further analysis of *Rooker-Feldman*. As noted previously, the Supreme Court held in *Feldman* that "[i]f the constitutional claims presented to a United States

District Court are inextricably intertwined" with the state court's judgment, then the federal district court has no jurisdiction. 460 U.S. at 483 n. 16, 103 S.Ct. 1303. This Court has determined that issues are "inextricably intertwined" when a plaintiff casts a complaint in the form of a civil rights action simply to circumvent the *Rooker-Feldman* rule. *Liedtke,* 18 F.3d at 317.

The *Feldman* holding appears to squarely fit Richard's situation. The *Cox* court's findings that allow for certification are "inextricably intertwined" with Richard's constitutional challenge to the state's compliance with due process requirements. A federal court cannot examine the due process deficiencies in *Cox* without disturbing the underlying judgment.

Moreover, the *Liedtke* holding is also applicable here. In order to comply with *Liedtke,* a plaintiff cannot assert a § 1983 claim to circumvent the *Rooker-Feldman* doctrine. 18 F.3d at 317. However, as discussed below, Richard's § 1983 claim is clearly untenable. His blatant nonconformity with the requirements of § 1983 thus suggests that he has merely cast his complaint in the form of a civil rights action in an attempt to circumvent *Rooker-Feldman.* Given that his underlying § 1983 argument fails, the class action procedural issues that Richard raises are irrelevant. Because Richard's § 1983 claim merely serves as an instrument for evading *Rooker-Feldman,* that doctrine bars his claim.

To state a claim under § 1983, a plaintiff must allege facts tending to show that the defendant has acted "under color of state law." *American Mfrs. Mut. Ins. Co. v. Sullivan,* 526 U.S. 40, 119 S.Ct. 977, 143 L.Ed.2d 130 (1999); *Lugar v. Edmondson Oil Co.,* 457 U.S. 922, 102 S.Ct. 2744,

73 L.Ed.2d 482 (1982); *Blum v. Yaretsky,* 457 U.S. 991, 102 S.Ct. 2777, 73 L.Ed.2d 534 (1982); *Flagg Bros. v. Brooks,* 436 U.S. 149, 98 S.Ct. 1729, 56 L.Ed.2d 185 (1978). "[T]he under-color-of-state-law element of § 1983 excludes from its reach merely private conduct, no matter how discriminatory or wrongful." *Sullivan,* 526 U.S. at 50, 119 S.Ct. 977 (internal quotations omitted). A plaintiff must show that the party charged with depriving the plaintiff of her federal right is an entity that can be fairly described as a state actor. *Lugar,* 457 U.S. at 937, 102 S.Ct. 2744.

This Court has previously outlined the various tests that the Supreme Court employs to determine whether a private party has acted under color of state law. *Bass v. Parkwood,* 180 F.3d 234, 241-43 (5th Cir.1999) (applying the tests to hold that a private mental institution did not act under color of state law by committing the plaintiff). According to the public function test, a private entity acts under color of state law when the entity performs a function which is "exclusively reserved to the state." *Flagg Bros.,* 436 U.S. at 157-58, 98 S.Ct. 1729. (internal quotations omitted); *Wong v. Stripling,* 881 F.2d 200, 202 (5th Cir.1989). The state compulsion (or coercion) test holds the state responsible "for a private decision only when [the state] has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State." *Blum v. Yaretsky,* 457 U.S. 991, 1004, 102 S.Ct. 2777, 73 L.Ed.2d 534 (1982) (internal quotations omitted). Similarly, the nexus or state action test finds state action where the state has "so far insinuated itself into a position of interdependence with the [private actor] that it was a joint participant in the enterprise." *Jackson v. Metropolitan Edison Co.,* 419 U.S. 345, 357-58, 95 S.Ct. 449, 42

L.Ed.2d 477 (1974); *see also Lugar,* 457 U.S. at 941-42, 102 S.Ct. 2744 (1982).

Richard argues that Appellees acted under color of state law based on the state action test. He relies on *Lugar,* in which the Supreme Court found "joint participation" between a private actor and the state. 457 U.S. at 942, 102 S.Ct. 2744. In *Lugar,* a creditor allegedly failed to meet the statutory requirements for enforcing attachment of the debtor's property, yet state officials seized the property without allowing the debtor to defend the action. *Id.* at 925, 102 S.Ct. 2744. The Court found joint participation because the state officials committed an *ex parte* action at the request of a private party. *Id.* at 942, 102 S.Ct. 2744. In reaching this conclusion, the Court stated that to find state action under § 1983, the plaintiff must satisfy two criteria. *Id.* at 937, 102 S.Ct. 2744. First, the deprivation at issue must "be caused by the exercise of some right or privilege created by the [s]tate or by a rule of conduct imposed by the state or by a person for whom the [s]tate is responsible." *Id.* Second, the private "party charged with the deprivation must be a person who may fairly be said to be a state actor." *Id.*

Although Richard's allegations are sufficient to satisfy the first prong of this test, the allegations fall well short of satisfying the second prong. Richard cannot show that the Appellees can "fairly be said to be . . . state actor[s]." *Lugar,* 457 U.S. at 942, 102 S.Ct. 2744. Richard attempts to reach this conclusion by reasoning that a private party is a state actor if the party either (1) complies with a wrong judgment, or (2) commits wrongful acts that influence a judgment. Both arguments fail. With respect to the first argument, this Court's precedent establishes that even if a court wrongly decides a case, the fact that a

private party complies with that wrong decision does not constitute state action. *Landry v. A-Able Bonding, Inc.*, 75 F.3d 200 (5th Cir.1996). In *Landry*, the plaintiff brought a § 1983 suit for false imprisonment against a bail bondsman. *Id.* Although the bondsman possessed a state-issued warrant, this Court found that he had not acted under color of state law because he did not communicate that he was acting under state authority during the seizure. *Id.* at 204-05. Complying with the state order did not subject him to suit under § 1983. *Id.* Accordingly, even if the *Cox* court wrongly decided the case, the fact that the Appellees complied with the judgment does not imply that the Appellees acted under color of state law.

With respect to Richard's second argument, Richard contends that committing a wrongful act which influences a judgment amounts to "joint participation" with a state official. In support of this contention, Richard relies on *Dennis v. Sparks*, 449 U.S. 24, 101 S.Ct. 183, 66 L.Ed.2d 185 (1980). In *Sparks*, the Supreme Court held that private parties acted under color of state law when they conspired *with* a judge. *Id.* at 28, 101 S.Ct. 183. The judge's conscious role in the illegality of the judgment caused the private parties' conduct to be actionable under § 1983. *Id.* In reaching this conclusion, the Court pointed out that "merely resorting to the courts and being on the winning side of a lawsuit does not make a party a co-conspirator or a joint actor with the judge." *Id.*

Consistent with the *Sparks* holding, the Second Circuit has rejected the argument that wrongful action by counsel qualifies as "state action" under § 1983. *Dahlberg v. Becker*, 748 F.2d 85, 92 (2d Cir.1984). In *Dahlberg*, the plaintiff alleged that the defendant and her attorneys submitted a false affidavit which influenced a state court

decision. *Id.* at 87-88. The court held that if "a judge . . . unknowingly signs a defective order that has been prepared and submitted to him by an attorney," this does not imply that the attorney acted under color of state law. *Id.*

We agree with the Second Circuit's reasoning in *Dahlberg*. If a judge reaches a decision based on misinformation that counsel provides, the issuance of the decision does not imply that counsel acted under color of state law. *Id.* Applying this principle to Richard's situation leads us to hold that Appellees did not act under color of state law. Like *Dahlberg*, and unlike *Sparks*, Richard does not contend that the judge knowingly participated in the alleged conspiracy. Richard only alleges that the Appellees conspired with opposing counsel *before* a judge. Although the Appellees may have colluded with opposing counsel, Richard fails to allege that the state judge was in any way involved in the misconduct. Indeed, Richard characterizes the state judge as "an innocent agent." Thus, the Appellees are not state actors under § 1983, and Richard fails to state a claim under § 1983.

The failure of Richard's § 1983 claim persuades us that his claim serves only as a means for challenging the state court judgment in federal court. As such, it falls within the scope of claims that we may dismiss "for lack of subject matter jurisdiction because of . . . [the] inadequacy of the federal claim. . . . " *Steel Co. v. Citizens for Better Environment*, 523 U.S. 83, 89, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998). Richard has attempted to circumvent the *Rooker-Feldman* doctrine by intertwining a groundless § 1983 claim with the state court findings. His jurisdictional challenge to the *Shutts* procedures is irrelevant because the underlying federal claim is unfounded. Under

these circumstances, applying the *Rooker-Feldman* doctrine to bar his claim is entirely appropriate.

B. Richard's RICO Claim

Richard contends that the district court erred in dismissing his claim for equitable relief in the form of a disgorgement of the Appellees' past profits. He argues that equitable relief should be available for private civil RICO plaintiffs under 18 U.S.C. § 1964(a)-(c). This Court has not decided whether equitable relief is available to a private civil RICO plaintiff. *Price v. Pinnacle Brands,* 138 F.3d 602, 605 n. 5 (5th Cir.1998) (stating that this Court "has specifically reserved ruling on whether all forms of injunctive relief and other equitable relief are foreclosed to private plaintiffs under RICO") (internal quotations omitted). The circumstances before us do not necessitate that we reach this question today. Even if equitable relief were available to a private party, disgorgement is not a proper remedy given the circumstances present in this case. Section 1964(a) provides:

> The district courts of the United States shall have jurisdiction *to prevent and restrain violations* of section 1962 of this chapter by issuing appropriate orders, including, but not limited to: ordering any person to divest himself of any interest, direct or indirect, in any enterprise; imposing reasonable restriction on the future activities or investments of any person including, but not limited to, prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in, the activities of which affect interstate or foreign commerce; or ordering dissolution or reorganization of any enterprise, making due provisions for the rights of innocent persons.

18 U.S.C. § 1964(a). The Second Circuit has considered the conditions for disgorgement under this statute in a RICO suit. *United States v. Carson,* 52 F.3d 1173, 1181 (2d Cir.1995). The Second Circuit interpreted § 1964(a) to mean that equitable remedies are only proper to "prevent and restrain *future* conduct rather than to punish *past* conduct." *Id.* at 1182. The court reasoned that the three examples of permissible remedies in § 1964(a) were forward-looking, and focused on preventing future RICO violations. *Id.* at 1181. With respect to the disgorgement remedy sought, the Second Circuit noted that disgorgement is generally available under § 1964. *Id.* However, when disgorgement is sought for the purpose of compensating a party for past injuries, the court held that the plain language of § 1964 bars relief. *Id.* at 1182.

We agree with the Second Circuit's reasoning in *Carson.* Section 1964(a) establishes that equitable remedies are available only to prevent ongoing and future conduct. Here, Richard does not seek disgorgement to "prevent and restrain" the Appellees from producing PB plumbing systems. In fact, in his Second Amended Complaint, Richard concedes that the Appellees no longer market the plumbing systems. Furthermore, Richard fails to argue that such disgorgement would prevent manufacturers of similar products from committing similar injuries. Simply stated, he fails to argue that disgorgement would "prevent and restrain" similar RICO violations in the future. Absent this argument, Richard's disgorgement claim seems to do little more than compensate for the alleged loss. The disgorgement claim is therefore impermissible under § 1964(a). By failing to state a proper remedy, Richard's RICO claim is void.

IV. CONCLUSION

For the foregoing reasons, we AFFIRM the judgment of the district court to dismiss Richard's § 1983 claim based on the district court's lack of subject matter jurisdiction under *Rooker-Feldman*. We also AFFIRM the judgment of the district court to dismiss Richard's RICO claim for failure to state a claim pursuant to Federal Rule of Civil Procedure 12(b)(6).

WIENER, Circuit Judge, concurring in part and dissenting in part:

I concur with the panel majority's disposition of this appeal in every respect except for its treatment of the potential availability of disgorgement of profits as an equitable remedy under 18 U.S.C. § 1964. More specifically, I cannot read § 1964(a) or the Second Circuit's opinion in *United States v. Carson*[1] to eschew the possibility of disgorgement in the instant case. I agree, as does the panel majority, with the *Carson* court's restriction of equitable remedies to prevent or restrain future conduct rather than to punish past conduct,[2] but, respectfully, I find illogical the panel majority's application of that principle to the instant case.

It is true that Richard does not seek disgorgement to prevent or restrain the production of PB Plumbing Systems, which all acknowledge are no longer produced and marketed. The permissible purposes of disgorgement as an equitable remedy are not, however, so limited as to be

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[1] 52 F.3d 1173 (2d Cir.1995).

[2] *Id.* at 1182.

available only to prevent or restrain the continued production and marketing of the particular product that produced the tainted profits in question. First, because the profits disgorged in a civil RICO class action are not necessarily distributed to the class members ratably according to the quantum of their respective injuries, the remedy is not analogous to compensatory damages. Second, disgorgement of ill-gotten gains is closely analogous to the equitable remedy of exemplary damages, as the principal purpose is not simply to punish the offending parties for having conspired to make the illicit profits but to convey a strong message, to the conspirators and to third parties alike, that there is yet another disincentive to engaging in such proscribed conduct. Thus, it seems clear to me that the primary thrust of disgorgement *is* to "prevent and restrain" the offending parties – as well as all potential malefactors who receive the message – from engaging in such activities with *any* product, not just the single discontinued product that happened to have been the object of the proscribed behavior alleged in the particular case.

Neither do I find it determinative that Richard failed to state explicitly in his prayer for the disgorgement remedy that disgorgement "would prevent manufacturers of similar products from committing similar injuries." It has to be self-evident to courts and litigants alike that a prayer for disgorgement of profits in a case like this one is intended to prevent and restrain similar future conduct. To require the incantation of those talismanic words – jurisprudential, not statutory – would be to require a hollow act and to elevate form over substance. By its very nature, disgorgement is designed to "prevent manufacturers of similar products" from engaging in such conduct in

the future, making incidental at best any element of compensation to class members.

As I disagree with the conclusion of my learned colleagues of the panel majority that Richard's RICO claim is void for failure to state a proper remedy, I respectfully dissent.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TEXARKANA DIVISION

RICHARD R. RICHARD, JR., ET AL.	§	
	§	
v.	§	**5:00-CV-8**
	§	
HOECHST CELANESE CHEMICAL GROUP, INC., ET AL.	§	
	§	

MEMORANDUM OPINION AND ORDER

(Filed Mar. 30, 2002)

Plaintiff Richard has brought suit on behalf of himself and other similarly situated plaintiffs against Defendants Hoechst Celanese Chemical Group, Inc. and Hoechst Celanese Corp. (Hoechst), Shell Oil Co. d/b/a Shell Chemical Co. (Shell) and E.I. DuPont de Nemours & Co. (DuPont). On May 25, 2001, Plaintiffs and Defendant Dupont (the Settling Parties) made a joint motion for preliminary class certification and preliminary approval of settlement (Dkt. No. 95) (Settlement Motion). This motion is opposed by Defendants Shell and Hoechst, who argue, in their respective motions to dismiss, that the Court does not have jurisdiction to hear the case and that Plaintiff has failed to state a claim upon which relief can be granted. In a similar motion, DuPont moved for dismissal, arguing that this Court does not have jurisdiction to consider Plaintiff's due process claim, and that Plaintiff's due process and RICO claims should be dismissed for failure to

state a claim upon which relief can be granted.[1] DuPont's motion remains pending.

On June 18, 2001, the Court held a hearing on the Settlement Motion. After the hearing, the Court entered an Order instructing the parties to file briefs addressing the contested issue of federal court jurisdiction. On October 17, 2001, the Court held a hearing regarding the Court's jurisdiction. The Court now determines first that it has jurisdiction to hear the present case, second that the class cannot be certified for settlement purposes, and third that Defendants' motions to dismiss for failure to state a claim upon which relief can be granted are well taken and should be granted.

I

BACKGROUND

This is a class action lawsuit brought to recover damages for injury allegedly caused by the Defendants' manufacture, promotion and sale of polybutylene for use in residential and commercial plumbing systems for potable water. The class has not been certified. Plaintiff alleges that not only was polybutylene unsuitable for such use, but that the Defendants knew that their products were defective for this purpose.

Polybutylene resin (polybutylene) is a type of plastic that is produced as a by-product of oil refining. In the late

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[1] DuPont has not withdrawn its motion to dismiss, but will do so upon approval by the Court of the proposed settlement. (DuPont's Reply to Pla. Resp. to Def. Mot. Dism. at 1, Dkt. No. 125.)

1970's, Defendant Shell developed flexible pipes made of polybutylene which were promoted and marketed for residential and commercial potable water plumbing systems. Joint fittings for polybutylene plumbing systems were made from resins developed by Defendants Hoechst and DuPont. The resin developed by Hoechst was marketed under the name "Celcon," and DuPont's was marketed as "Delrin." Defendants produced the materials used in the pipes, joints, fittings and resins that comprised polybutylene plumbing systems. Polybutylene systems were sold to the mobile home industry, recreational vehicle industry, residential developers, plumbing contractors, and individuals. Promoters of polybutylene systems claimed that the product was superior to existing plumbing systems because it was lightweight, inexpensive, better able to withstand freezing temperatures, easier to install and purportedly enjoyed a lifetime of 50 years. Such representations notwithstanding, many polybutylene systems developed leaks when exposed to chlorinated water such as most municipalities use.

Plaintiff Richard brings this action on behalf of himself as well as a class of similarly situated persons pursuant to Fed. R. Civ. P. 23. The Class is defined in the Second Amended Complaint as follows:

> All Texas citizens, residents and entities authorised to do business in Texas that own plumbing systems in structures in Texas and elsewhere, in which there is polybutylene plumbing and over

> which Tennessee and Alabama courts lacked subject matter jurisdiction.[2]
>
> All U.S. citizens and entities that were excluded from the settlement classes of *Cox v. Shell Oil. Co.,* No. 18,844 (Tenn. Chanc. Ct., Obion City) and *Spencer v. Shell Oil Co.,* No. CV94-074 (Greene Cty., Ala.) because defects in their polybutylene plumbing systems were defined as nonqualifying.
>
> All U.S. citizens and entities that own structures containing polybutylene plumbing systems and have never participated in a polybutylene class action in a court of competent personal and subject matter jurisdiction.

(2nd Am.Compl. 6-7).

Plaintiff brought claims under Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1964(c), the Lanham Act, 15 U.S.C. § 1125(a), the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution, 42 U.S.C. § 1983[3], and common law tort. In briefings subsequent to the filing of the Second Amended Complaint, Plaintiff dropped his Lanham Act claim, leaving only his RICO and Due Process claims for consideration by this Court. *See* Pla. Memo. in Opp. to Def. Renewed Mot. Dism. 2nd Amend. Compl. at 4, (Dkt. No. 123).

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[2] There have been several cases involving polybutylene plumbing systems. The *Cox* and *Spencer* cases, in Tennessee and Alabama, respectively, resulted in a putative joint national settlement.

[3] Pla. Reply Memo re Prelim. Appr. of Class at 3, Dkt. No. 109.

On April 17, 2001, DuPont filed a renewed motion to dismiss Plaintiff's Second Amended Complaint under Rule 12. (Dkt. No. 65.) On May 25, 2001, the Settling Parties moved the Court to certify the class as to DuPont only, and further to grant preliminary approval of their Settlement Agreement. This motion was made without any retraction by DuPont of its motion to dismiss; instead, DuPont states that it will withdraw its motion to dismiss only after the Court has found that it has jurisdiction to hear the case.[4] (DuPont's Reply to Pla. Resp. to Def. Mot. Dism. at 1, Dkt. No. 125; DuPont's Reply to Shell's Resp. to Settlement Motion, Dkt. No. 111.)

Defendants Hoechst and Shell oppose preliminary approval of the Settlement Agreement. They argue first

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[4] At the October 17, 2001 hearing, DuPont's attorney clarified that while DuPont had filed a 12(b)(6) motion to dismiss the RICO claims, DuPont "never said that the Court does not have subject matter jurisdiction to take a look at those RICO claims." (Oct. 17, 2001, Trans. at 20-21.) DuPont's papers bear this message out. DuPont's April 17, 2001 "Renewed Motion to Dismiss Plaintiff's Second Amended Complaint" (Dkt. No. 89) reaffirmed previous filings on the subject, the most substantial of which was DuPont's October 31, 2000 "Memorandum in Support of its Rule 12 Motion to Dismiss Second Amended Class Action Complaint." (Dkt. No. 65.) In the earlier memorandum, DuPont argued that Plaintiff failed to state a RICO claim, asserting that Plaintiff's RICO arguments failed the 12(b)(6) standard applied in *Summit*. (DuPont's Rule 12 Memo. re. Dism. 2nd Amend. Compl. at 5 (Dkt. No. 65).) Although DuPont did argue that the Court lacked jurisdiction, this was in regard to Plaintiff's due process claim. (Id. at 8.) There was one area of inconsistency, however. In DuPont's October 31, 2000 memorandum, DuPont argued that Plaintiff's RICO claim failed to meet the particularity requirements of Rule 9(b). (DuPont's Rule 12 Memo. re. Dism. 2nd Amend. Compl. at 5 (Dkt. No. 65).) In contradiction to DuPont's briefing, DuPont's attorney opined at the hearing that Plaintiff's RICO statement does overcomes the requirements of 9(b). (Trans. at 20.)

that the Court has not yet determined that it has jurisdiction to hear the case and second that there has been an insufficient showing at this point to warrant approval of the proposed settlement, even on a preliminary basis.

The parties all agree that the first question before this Court is whether or not the Court has jurisdiction to hear the case. As explained below, the Court finds that it has subject matter jurisdiction. Plaintiff and DuPont argue that the Court, after determining that it has jurisdiction, should preliminarily certify the class in order to allow the putative class members to settle with Defendant DuPont. Defendants Hoechst and Shell, on the other hand, argue that the Court should dismiss the case for failure to state a claim upon which relief may be granted. Defendant DuPont has also filed a similar motion to dismiss. The disjuncture of the plans outlined above reveals the curiousness of Defendant DuPont's position. DuPont argues, by urging the Court to take the first course delineated above, that the Court should find that it has subject matter jurisdiction over the instant case and then, pursuant to its jurisdiction, approve the Settlement Agreement. In so arguing, DuPont opposes the second course, that the Court should, in the case that it has subject matter jurisdiction, grant Defendants' – including DuPont's – motions to dismiss the case. The Court will first address the question of jurisdiction, then the question of preliminary class certification, and finally the question of the adequacy of the pleaded claim.

II

DEFENDANTS' MOTIONS TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION

Defendants have filed both 12(b)(1) and 12(b)(6) motions to dismiss. As a general rule, the district court should resolve a 12(b)(1) motion before the defendant's other challenges because the court must find that it has subject matter jurisdiction before it can determine any other issues. *See Moran v. Kingdom of Saudi Arabia,* 27 F.3d 169, 172 (5th Cir. 1994). For the reasons detailed below, the Court determines that it has subject matter jurisdiction; Defendants' motions to dismiss for lack of subject matter jurisdiction are therefore denied.

A. Standard

In order to enjoy federal court jurisdiction under 28 U.S.C. § 1331, the plaintiff's cause of action must arise under the Constitution, laws, or treaties of the United States. The federal issue must arise in the complaint itself, and not from the plaintiff's anticipation of a defense based on the federal statute. *See Franchise Tax Board v. Construction Laborers Vacation Trust,* 463 U.S. 1 (1983); *Louisville & Nashville RR v. Mottley* 211 U.S. 149 (1908).

Plaintiff maintains that in determining subject matter jurisdiction, the signal question is not whether Plaintiff has alleged incontestable, or even probable, claims under 18 U.S.C. § 1964(c) (RICO), 28 U.S.C. §§ 1343(3) (redress right secured by the constitution) and 42 U.S.C. § 1983

(deprivation of constitutional right)[5]; rather, the question is whether Plaintiff's claims require the Court to construe federal statutes and therefore are contingent upon how those statutes are applied to the facts alleged. Because the Court must construe two federal statutes to adjudicate Plaintiff's claims for relief,[6] the Plaintiff argues that he has adequately alleged subject matter jurisdiction.

Plaintiff distinguishes the question of the Court's subject matter jurisdiction from the analysis necessary to consider a motion to dismiss under Rule 12(b)(6). Unlike a motion under 12(b)(6), Plaintiff argues, an inquiry into subject matter jurisdiction need not address the sufficiency of the allegations.

> [I]t is not necessary to decide whether [Plaintiffs'] alleged cause of action against [Defendants] . . . is in fact a cause of action on which [Plaintiffs] could actually recover. Instead, the test is whether the cause of action alleged is so patently without merit as to justify . . . the court's dismissal for want of jurisdiction.

Duke Power Co. v. Carolina Envtl. Study Group, Inc., 438 U.S. 59, 70 (1978), *citing Hagans v. Lavine*, 415 U.S. 528, 542 n. 10 ("Once a federal court has ascertained that plaintiff's jurisdiction conferring claims are not insubstantial on their face, no further consideration of the

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[5] Section 1983 creates a claim for relief; it does not grant a federal court jurisdiction to hear the claim. *Hagans v. Lavine*, 415 U.S. 528, 535 (1974). Therefore, for jurisdictional purposes, the Court considers only Plaintiff's RICO and § 1343(3) claims. *See* Pla. Memo in Law re Court's Subj. Mat. Juris. at 4 n. 2, Dkt. No. 117.

[6] *See infra*, note 4.

merits of the claim[s] is relevant to a determination of the court's jurisdiction of the subject matter.") (citations omitted.) The Court finds these arguments well taken. As the Supreme Court stated in *Steel Co. v. Citizens for a Better Environment,* 523 U.S. 83 (1998):

> It is firmly established in our cases that the absence of a valid (as opposed to arguable) cause of action does not implicate subject matter jurisdiction, *i.e.,* the courts' statutory or constitutional power to adjudicate the case . . . '[J]urisdiction is not defeated . . . by the possibility that the averments might fail to state a cause . . . of action on which petitioners could actually recover.' Rather, the District Court has jurisdiction if 'the right of petitioners to recover under their complaint will be sustained if the Constitution and laws of the United States are given one construction and will be defeated if they are given another' unless the claim 'clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction or where such a claim is wholly insubstantial and frivolous.' Dismissal for lack of subject matter jurisdiction because of the inadequacy of the federal claim is proper only when the claim is 'so insubstantial, implausible, foreclosed by prior decisions of this Court, or otherwise [so] completely devoid of merit as not to involve a federal controversy.'

Id. at 89 (citations omitted).

The inquiry into subject matter jurisdiction should not be an inquiry into the *merits* of a particular suit, beyond the broad considerations of insubstantiality and frivolousness outlined by *Steel.* "[W]hen the plaintiff bases his cause of action upon an act of Congress, jurisdiction cannot be defeated by a plea denying the merits of the

claim. . . . Unsuccessful as well as successful suits may be brought upon the act. . . ." *Accord The Fair v. Kohler Die and Specialty Co.,* 228 U.S. 22, 25 (1913). In federal question cases, the court has subject matter jurisdiction if, taking as true all the allegations of the complaint, alternative constructions of a federal statute are present, one of which sustains the claim, the other of which defeats it. *John Corp. v. City of Houston,* 214 F.3d 573, 576 (5th Cir. 2000). The Court considers Defendants' objections to Plaintiff's RICO and Due Process claims below.

B. RICO Claim

Defendants make two responses to Plaintiff's arguments in support of federal jurisdiction conferred by his RICO claims. First, Defendants concur that *Steel* controls in this case, but contend that Plaintiff's RICO claim under *Steel* is insubstantial and frivolous. Second, Defendants argue that Plaintiff lacks standing to sue in the instant case. The Court will address both of these arguments in turn.

i. Substantiality of RICO Claim

Defendants argue the Plaintiff's RICO claim is wholly insubstantial because it was not included in Plaintiff's original complaint, and because the Fifth Circuit's decision in *Summit Properties, Inc. v. Hoechst Celanese Corp.,* 214 F.3d 556 (5th Cir. 2000), *cert. denied,* 121 S.Ct. 896 (2001), forecloses it. As concerns Defendants' first protest, a plaintiff may amend his complaint as justice so requires; in this case, the Court granted Plaintiff leave to amend his Complaint. (October 2, 2000 Order, Dkt. No. 59). Therefore, the mere fact that Plaintiff's Complaint was

amended to include RICO claims is not sufficient to demonstrate that Plaintiff's claims are insubstantial.

Defendants' arguments regarding the role played by *Summit,* however, have greater force. In *Summit,* the Fifth Circuit held that the owner of a structure with polybutylene plumbing could not maintain a RICO claim against the defendants unless he could show he personally heard and relied upon the alleged misrepresentations made the basis of his mail and wire fraud claims. *Summit,* 214 F.3d 556. Defendants argue that *Summit* is controlling in the instant case, not least because of the overwhelming similarities between the two cases in the identities of the Defendants and the substance of the claims brought against them.

Plaintiff argues that *Summit* is distinguishable from the instant case. Plaintiff notes that the element of reliance was specifically disavowed by the plaintiffs in the *Summit* decision, while in the instant case, reliance is specifically alleged. Second, and alternately, Plaintiff argues that he falls within the "target" exception articulated by *Summit.* Defendants refute Plaintiff's target exception argument by noting that both *Summit* and *Procter & Gamble Co. v. Amway,* 242 F.3d 539 (5th Cir. 2001), limit the target exception to an instance in which a competitor was injured by reason of the Defendants' fraudulent misrepresentations to consumers that had the effect of diverting business away from the competitor. Defendant argues that Plaintiff is not a "target" within the meaning of those cases as a matter of law.

The Court will not here take up the substance of the parties' arguments; such consideration is addressed in Section IV of this Order. The Court does note, however,

that in order to determine the validity of Defendants' arguments, the Court must consider the *merits* of the parties' arguments. Such consideration is beyond the mandate of the jurisdictional test articulated by *Steel. Steel* held that "[d]ismissal for lack of subject matter jurisdiction because of the inadequacy of the federal claim is proper only when the claim is so insubstantial, implausible, foreclosed by prior decisions of this Court, or otherwise [so] completely devoid of merit as not to involve a federal controversy." 523 U.S. at 89 (citations omitted). Plaintiff's argument that the instant case is distinguishable from *Summit* on the critical question of reliance, as well as his argument that he meets the "target exception" to the *Summit* case requires the Court to consider the *merit* of Plaintiff's arguments, a consideration which exceeds the limits of a court's jurisdictional inquiry. Because Plaintiff has adequately pled his RICO claim, the Court finds that Plaintiff has jurisdiction to bring the instant case before it.

ii. Plaintiff's Standing

To establish standing, a plaintiff must demonstrate (1) an injury in fact, (2) traceable to the defendant's challenged conduct and (3) likely to be redressed by a favorable decision of the court. *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560 (1992); *Breaux v. U.S. Postal Serv.,* 202 F.3d 820, 820-821 (5th Cir. 2000). Here, Defendants contest element (2), proximate cause, relying on *Summit,* in which the owner of a structure with polybutylene plumbing could not maintain a RICO claim against the defendants unless he could show he personally heard and relied upon the alleged misrepresentations made the basis of his mail and wire fraud claims.

Plaintiff argues that Defendants perpetrated an unlawful scheme to misrepresent, and caused others to misrepresent, the properties of polybutelene plumbing systems, and that Defendants targeted the putative class members as victims. Plaintiff argues that these allegations establish a clear causal connection between the alleged injury and the Defendants' conduct. "[A] causal connection must exist between the alleged injury and the defendant's conduct." *Lujan* 504 U.S. at 559-60; *Steel,* 523 U.S. at 102-103; *Association of Community Orgs. for Reform Now v. Fowler,* 178 F.3d 350,-356 (5th Cir. 1999). "Causation," for purposes of conferring Article III standing exists solely where the alleged injury is "fairly traceable to the defendant's allegedly unlawful conduct. . . ." *Allen v. Wright,* 468 U.S. 737 (1984).

Defendants argue that Plaintiff's causation argument is effectively precluded by the *Summit* decision. However, as discussed above, Plaintiff has argued that *Summit* is distinguishable from the instant case. Furthermore, as discussed above, the Court cannot determine the applicability of *Summit* to the instant case without examining the *merits* of both Plaintiff's and Defendants' arguments. Any such examination, beyond the broad standard of insubstantiality and implausibility articulated by *Steel,* is improper at the threshold stage of jurisdictional inquiry. The Court therefore finds that the Plaintiff has standing to bring his claims.

C. Due Process Claim

In Plaintiff's Second Amended Complaint, he brought claims of violations by the Defendants of 28 U.S.C. §§ 1343(3) (redress right secured by the constitution) and

42 U.S.C. § 1983 (deprivation of constitutional right) which he has continued, in subsequent briefings to the Court, to maintain. Plaintiff argues that "[t]he putative national class action settlements in *Cox* and *Spencer* purport to deny plaintiff and other members of the Class an opportunity to litigate their claims against the Polybutylene Group." (Pla. 2nd Amend.Compl. ¶ 103.)

Plaintiff concedes that Section 1983 creates a claim for relief but does not grant a federal court jurisdiction to hear the claim. *Hagans v. Lavine,* 415 U.S. 528, 535 (1974); Pla. Memo in Law re Court's Subj. Mat. Juris. at 4 n. 2, Dkt. No. 117. This leaves the 28 U.S.C. §§ 1343(3) (redress right secured by the constitution) claim before the Court for purposes of determining jurisdiction. 28 U.S.C. §§ 1343(3) seeks:

> To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States. . . .

Hagans, 415 U.S. at 535 (finding that Section 1343(3) therefore conferred jurisdiction upon the District Court to entertain the constitutional claim if it was of sufficient substance to support federal jurisdiction.)

Plaintiff brings his 28 U.S.C. §§ 1343(3) claim based on the alleged denial of rights affected by the *Cox* and *Spencer* settlements. (2nd Am. Compl. at 30.) However, contrary to Supreme Court authority, the relief requested by Plaintiff requests the Court to review the final order and judgment approving the Tennessee nationwide class

action settlement. In *Rooker v. Fidelity Trust Co.,* 263 U.S. 413 (1923) and *District of Columbia Court of Appeals v. Feldman,* 460 U.S. 462 (1983), the Supreme Court held that, "a United States District Court has no authority to review final judgments of a state court in judicial proceedings." *Feldman,* 460 U.S. at 482. As the Fifth Circuit has explained, "[i]t is axiomatic that a federal district court, as a court of original jurisdiction, lacks appellate jurisdiction to review, modify, or nullify a final order of a state court." *Lampkin-Asam v. Supreme Court of Florida,* 601 F.2d 760 (5th Cir. 1979). Accordingly, Plaintiff cannot seek to have this Court review the final judgments of the *Cox* and *Spencer* Courts.

Even the settling Defendant DuPont, who argues that the Court has jurisdiction to hear this case, objects to jurisdiction under Section 1343(3). DuPont argues that Plaintiff's collateral attack on the *Cox* and *Spencer* judgments, although framed as a § 1983 claim, violates the *Rooker-Feldman* doctrine and that the Court does not have jurisdiction based on that claim. DuPont argues that the Court's jurisdiction must be based on RICO, since "jurisdiction of the . . . Section 1983 claims is doubtful at best." (DuPont's Memo. re Juris. Issues at 2 (Dkt. No. 124); *see also* DuPont's Memo. re Dism. 2nd Amend. Compl. (Dkt. No. 65); DuPont's Reply to Certification Mot. (Dkt. No. 111).) The Court finds that Defendants' motions to dismiss Plaintiff's due process claims for lack of subject matter jurisdiction are well taken and are therefore granted.

III

CLASS CERTIFICATION

On May 25, 2001, Plaintiff and Defendant DuPont moved the Court to certify the class as to DuPont only for purposes of settlement. The DuPont Settlement Class was defined as:

> All persons and entities who own or who previously owned or will own any improvements to real property or structures in the United States in which there is or was during the time of such ownership, a polybutelene plumbing system with acetal insert fittings.

(Jt. Mot. Prelim. Class Cert. Exh. A, Dkt. No. 95.) The Court held a hearing on preliminary approval of the class certification and preliminary settlement on June 18, 2001. At the hearing, the question of the Court's jurisdiction arose; without determining that the Court had jurisdiction to hear the case, the Court could not go forward to address class certification. The Court therefore ordered the parties to file briefs addressing the question of the Court's jurisdiction to hear the case. (June 19, 2001 Order (Dkt. No. 114).) Those briefs were heard before the Court on October 17, 2001. It is Plaintiff's and DuPont's position that the Court does have subject matter jurisdiction to hear Plaintiff's RICO claims, and further that the Court should approve the class certification for purposes of settlement. Shell and Hoechst argued that the Court does not have jurisdiction.

As discussed above, the Court finds that it does have subject matter jurisdiction to hear the case. Plaintiff and DuPont therefore request that the Court go on to approve the preliminary class certification; Defendants Shell and

Hoechst (and DuPont) have filed 12(b)(6) motions to dismiss and desire the Court to next consider these motions. (Oct. 17, 2001 Trans. at 32.) However, before the Court can address these 12(b)(6) motions to dismiss, it must consider the question of class certification. *Miller v. Mackey International, Inc.*, 452 F.2d 424 (5th Cir. 1971); *see also Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974).

Federal Rule of Civil Procedure 23(e) provides that, "A class action shall not be dismissed or compromised without the approval of the court, and notice shall be given to all members of the class in such a manner as the court directs." Typically, approval of a class action settlement involves a two-step process. First, the Court makes a preliminary fairness evaluation of the proposed terms of settlement submitted by counsel. Second, if the Court determines that the settlement is fair, the Court directs that notice pursuant to Rule 23(e) be given to the class members of a formal fairness hearing, at which arguments and evidence may be presented in support of and in opposition to the settlement.[7] *Manual for Complex Litigation, Third*, § 30.41. In the present case, however, no class has been certified, so the Court must first determine if the proposed settlement class is certifiable before it proceeds to make an initial fairness determination. *See Amchem v. Windsor*, 521 U.S. 591, 620 (1997).

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[7] In cases where a class is certified for settlement purposes only, notification of class certification under Rule 23(c)(2) may also be given to members along with 23(e) settlement notice for the sake of economy. *Manual for Complex Litigation, Third*, at § 30.41.

A. Standard

Because making a fairness determination necessarily requires the Court to determine if the proposed class is a proper class for settlement purposes, the Court must examine the law regarding class certification and how that law is applied in the context of a proposed settlement-only class.

> Confronted with a request for settlement-only class certification, a district court need not inquire whether the case, if tried, would present intractable management problems, see Fed. Rule Civ. Proc. 23(b)(3)(D), for the proposal is that there be no trial. But other specifications of the Rule – those designed to protect absentees by blocking unwarranted or overbroad class definitions – demand undiluted, even heightened, attention in the settlement context.

Amchem, 521 U.S. at 620. Here Plaintiff and DuPont request preliminary class certification for the limited purpose of settlement.

A district court may certify a class only if the plaintiff meets its burden to show that the proposed class and the proposed class representatives meet the four prerequisites in Rule 23(a) and one of three additional requirements in Rule 23(b). *See* FED. R. CIV. P. 23; *see also Mullen v. Treasure Chest Casino, LLC,* 186 F.3d 620, 623 (5th Cir. 1999); *Castano v. American Tobacco Co.,* 84 F.3d 734, 740 (5th Cir. 1996). A district court has "great discretion" in determining whether to certify a class, but the district court must make a reasoned and thorough analysis under Rule 23. *Mullen,* 186 F.3d at 624.

The four Rule 23(a) prerequisites include: (1) numerosity; (2) commonality; (3) typicality; and (4) adequacy of representation. FED. R. CIV. PROC. 23(a); *Amchem,* 521 U.S. at 613. All four must be satisfied in order for the court to certify the class. Once the plaintiff satisfies these prerequisites, he must then satisfy the requirements of one of the three subdivisions of Rule 23(b). *See Amchem,* 521 U.S. at 614. The requirements of these subdivisions include: (1) inconsistent adjudications would result in incompatible standards of conduct or any adjudication would bear heavily on the interests of non-parties; (2) the party opposing the class has acted or refused to act on grounds generally applicable to the class; and (3) issues of law and fact predominate issues unique to individual class members, and maintaining the class action is the superior procedural vehicle. FED. R. CIV. P. 23(b)(1)-(3).

B. Discussion

The Settling Parties have not articulated which subdivision of Rule 23(b) they satisfy; indeed, the Settling Parties articulate very little regarding the fairness, adequacy, and reasonableness of the settlement. In the hearing before the Court on June 18, 2001, Plaintiff explained that the motion for preliminary certification was the first step Plaintiff envisioned in a series of actions before the Court on route to a final class certification and settlement approval. Plaintiff argued that after making an initial presentation to the Court, he could later provide, "all of the information that the Court will want and will need in order to make a determination whether or not this settlement is fair and should be approved." (June 18, 2001 Trans. at 8.) However, as *Amchem* demonstrates, the Court must conduct a substantial inquiry relating to

certification before it can certify a class, even for purposes of settlement.

Moreover, the Court need not address Plaintiff's motion for preliminary certification on the details of that motion, because the Court finds another significant obstacle to preliminary certification, and that is Fifth Circuit case law regarding certification of RICO claims. Without oppugning its determination that it has jurisdiction in the instant case, the Court notes that in the wake of *Summit* and another Fifth Circuit case, *Patterson v. Mobil Oil,* 241 F.3d 417 (2001), it may not be possible to certify a class in a RICO action within the Fifth Circuit.

In *Patterson,* plaintiff employees brought a class action asserting RICO claims. Plaintiffs asserted that defendant failed to comply with Texas law requiring an employer to obtain workers' compensation insurance in order to benefit from the bar of negligence suits by injured employees. Defendant appealed the certification order of the district court judge. The Fifth Circuit reversed the certification, finding that a fraud class action could not be certified when individual reliance would be an issue, and concluded that the district court erred as a matter of law in certifying the class because the predominance requirement could not be met. Citing *Summit,* the court held that each member of the putative class had to prove reliance upon defendant's alleged fraud in stating it was covered by workers' compensation insurance. To do that, each plaintiff would have to make an individual showing that she could have and would have sued defendant, but did not do so because the asserted false statements led her to believe her suit to be barred by the workers' compensation regime. The court held that while there may have been an issue of fact common to all class members, that question did not

predominate over the question of whether or not each member of the class suffered a RICO injury.

Shortly before deciding *Patterson,* the Fifth Circuit decided *Bolin v. Sears Roebuck & Co.,* 231 F.3d 970 (5th Cir. 2000). In *Bolin,* the plaintiffs sought certification of a class under 23(b)(2), which requires a showing that (1) the behavior complained of is generally applicable to the class as a whole and (2) injunctive relief predominates over damages sought. *Bolin,* 231 F.3d at 975. The Fifth Circuit reversed the district court's certification of the class, finding that "the individual findings of reliance necessary to establish RICO liability and damages preclude not only b(2) certification of this class under RICO, but (b)(3) certification as well." *Id.* at 978.

Patterson and *Bolin* demonstrate the difficulty, if not the impossibility, of certifying a class for settlement purposes in the instant case. The commonality requirement mandated by Rule 23 cannot be met where plaintiffs also seek to fulfill the direct reliance requirements defined by *Summit. Patterson,* 241 F.3d at 419; *Bolin,* 231 F.3d at 978; *see also Castano v. American Tobacco Co.,* 84 F.3d 734 (5th Cir. 1996) (stating that reliance should not be inferred by a district court because an accurate finding on predominance is necessary before the court can certify a class).

IV

DEFENDANTS' MOTIONS TO DISMISS FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED

A. Standard

Under the Federal Rules of Civil Procedure, Rule 12(b)(6) motions to dismiss are appropriate where the defendant or counter-plaintiff attacks the complaint because it fails to state a legally cognizable claim. A motion to dismiss an action for failure to state a claim "admits the facts alleged in the complaint, but challenges plaintiff's rights to relief based upon those facts." *Tel-Phonic Servs., Inc. v. TBS Int'l, Inc.*, 975 F.2d 1134, 1137 (5th Cir. 1992). The test for determining the sufficiency of a complaint under Rule 12(b)(6) was set out by the United States Supreme Court in *Conley v. Gibson*:

> [I]n appraising the sufficiency of the complaint we follow, of course, the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.

Conley v. Gibson, 355 U.S. 41, 45 (1957); see also *Grisham v. United States,* 103 F.3d 24, 25-26 (5th Cir. 1997).

B. RICO Claim

For the purposes of determining the sufficiency of Plaintiff's RICO claim, the Court assumes that the facts alleged in Plaintiff's Second Amended Complaint and RICO Statement are true. The question is then whether or not Plaintiff can state a claim in RICO under such facts in

the Fifth Circuit. For the reasons below, the Court holds that Plaintiff cannot.

i. ***Summit Properties, Inc. v. Hoechst Celanese Corp.***

In the Fifth Circuit's *Summit* decision, a group of plaintiffs who owned properties in which polybutylene plumbing systems were installed brought suit for violations of civil RICO against a group of defendant polybutylene manufacturers. That group included the Defendants of the instant case. The *Summit* plaintiffs contended that defendants manufactured and marketed polybutylene systems and components through a complex scheme to defraud building code approval officials, members of the building industry such as builders and plumbers, and other consumers.

The *Summit* plaintiffs conceded that they did not detrimentally rely on any of the defendants' allegedly fraudulent misrepresentations that served as the basis for the RICO claims. They argued that individual acts of reliance on the predicate mail or wire fraud are not necessary to establish the proximate causation prong of a claim under RICO. The Fifth Circuit disagreed, holding that *direct reliance on the misrepresentations* is required by the RICO statute, 18 U.S.C. § 1962, *et seq.*

Summit thoroughly considered the rationale for requiring reliance:

> [In] a claim for fraud . . . the linkage is between the defendants' fraud and the injury. As a product travels in the stream of commerce, inherent defects are carried with it, but fraudulent statements are not. . . . The causal connection between

> a misrepresentation and a subsequent harm . . . vanishes once the product travels beyond the entity who actually relied on the representation when making the purchasing decision. In other words, even if intermediary builders, plumbers, code officials, or prior owners relied on the defendants' alleged misrepresentations when choosing to use or approve [polybutylene] plumbing, that does not tell us whether the defendants' fraud proximately caused the plaintiffs' injuries, for which the defect was a producing cause. At best, any fraud during the sale of those products proximately injured only those initial purchasers who relied on the alleged misrepresentations, since the fraud facilitated a sale that might not otherwise have been made.

Id. at 560. Under such a rationale, the court contemplated only two groups able to bring actions under RICO: distributors who directly relied on defendants' representations, and competitor manufacturers injured by sales of defendants' defective merchandise. Plaintiffs in the instant case fall under neither category.

ii. Discussion

Plaintiff argues that the instant case is distinguishable from *Summit* in two significant respects. First, Plaintiff argues that the plaintiffs in *Summit* conceded that there was no reliance, while Plaintiff here does not so concede, and second, Plaintiff argues that *Summit* never determined whether the plaintiffs in that case might fall under the "target exception" that it articulated.

Regarding reliance, the Court finds that the only notable distinction between the causation elements in

Summit and the instant case are in name. While Plaintiff in the instant case alleges indirect reliance and the *Summit* plaintiffs conceded that there was no reliance, Plaintiff's Complaint does not demonstrate any fact situation which might distinguish his relationship with Defendants from those relationships which existed in *Summit.* Plaintiff describes a number of allegedly false communications made by Defendants. Some of the communications were made among the Defendants; others were made to the manufacturers of the plastic piping in question. Not a single communication is alleged to have reached the Plaintiff, however. Instead, Plaintiff states, for example, that "The Polybutylene Group's [i.e., the Defendants'] promotion and sale of polybutylene systems, including fraudulent and false statements relied on by Plaintiff and other members of the Class, were intended to and did assure the plaintiff and Class members that the polybutylene systems were suitable for potable water plumbing systems." (2nd Amend. Compl. at 23.) But Plaintiff fails to specifically identify the allegedly fraudulent statements upon which he relied to his detriment. In fact, Plaintiff never states that he himself actually saw or heard a false communication. Nor does he contend that the intermediaries in this case – the manufacturers of plastic piping – communicated the alleged misrepresentations to the putative class.

As was the case in *Summit,* Plaintiff has not shown that there was any misrepresentation, or reliance thereon, made to Plaintiff *directly.* The necessity of direct reliance was the holding of *Summit.* As Defendant DuPont stated, prior to its request to settle with Plaintiff:

> The *Summit* decision is wholly dispositive of Plaintiff's five RICO counts. . . . Plaintiff's RICO

> statement shows that the facts on which Plaintiff relies with respect to DuPont are not only similar to those in *Summit,* they are identical. . . . The Fifth Circuit held as a matter of law in *Summit* that those allegations failed to state a claim and are subject to dismissal under Fed. R.Civ. P. 12(b)(6). That decision is binding here.

(DuPont's Memo. in Support of its Renew. Mot. to Dism. Pla. 2nd Amend. Compl. at 2-4.)

With respect to Plaintiff's "target exception" argument, the Court finds it similarly unpersuasive. Plaintiff argues that the Fifth Circuit did not expressly determine that the *Summit* plaintiffs did not qualify under the "target exception"; at the October 17, 2001 Jurisdiction Hearing, Plaintiff reasoned that the *Summit* court never reached the question of whether the plaintiffs were the "targets" of the defendants' allegedly fraudulent acts. As such, Plaintiff argued, the question of whether Plaintiff meets the target exception to the *Summit* holding is open to this Court.

As noted above, *Summit* contemplated two groups that might qualify for its "target exception": distributors who directly relied on defendants' representations, and competitor manufacturers injured by sales of defendants' defective merchandise. The *Summit* court took care to explain the rationale behind this exception, and then took equal care in explaining why such a rationale did not apply to the *Summit* plaintiffs:

> [W]hen an action poses a high and foreseeable risk on a third party, we may view the resulting injury as deliberate for the purpose of liability [considering why brokerage customers might recover under RICO for losses stemming from a series of fraudulent transactions]. . . . In the

> present case, however, the plaintiffs' risks of injuries did not arise as direct and contemporaneous results of any alleged fraud, but instead arose only later, through the purchases of allegedly defective plumbing by transactions which were not tainted with fraud.

Id. at 561. The Court finds that the *Summit* decision itself addressed the unraised theory that the *Summit* plaintiffs might be a target exception to the proximate causation requirements found under RICO. The Settling Parties cite *Alpha/Omega Ins. Serv., Inc.,* 272 F.3d 280, 284 (7th Cir. 2000) in defense of their "target exception" argument, arguing that the *Summit* plaintiffs first asserted the target exception argument in their motion for rehearing, and therefore the court did not reach the merits of whether the plaintiffs could proceed on a target theory. The *Alpha/Omega* Court found that "because a summary denial of a petition for rehearing does not explain the bases for the denial, it is 'insufficient to confer any implication or inference regarding a court's opinion relative to the merits of a case.'" *Id.,* citing *United States v. Thomas,* 11 F.3d 732, 726 (7th Cir. 1993). However, unlike the court in *Alpha/Omega,* the *Summit* Court did consider the substance of the issue in question, and found that the *Summit* plaintiffs did not fit the court's "target exception."

Plaintiff points to the Fifth Circuit's holding in *Proctor & Gamble Co. v. Amway Corp.,* 242 F.3d 539 (5th Cir. 2001) as an example of how *Summit*'s "target exception" might be applied to the RICO claims of the instant case. In *Proctor & Gamble,* the plaintiff P&G alleged that using the wire and the mail, defendant Amway attempted to lure P&G's customer's away by fraud. The fraud consisted of a rumor that P&G is a Satanic company whose president

worships Satan and whose profits go in part to the church of Satan. The *Proctor & Gamble* Court found, relying on the "target exception" articulated in *Summit,* that P&G's RICO claims based on Amway's alleged spreading of the Satanism rumor to lure customers from P&G were claims on which relief could be granted. The court determined that although P&G did not rely on the fraud, the situation fell into the narrow exception carved out by *Summit,* in which the *Summit* Court stated that "in the current case, for example, the defendant's competitors might recover for injuries to competitive position. . . ." *Proctor & Gamble,* 242 F.3d at 565 (citing *Summit,* 214 F.3d at 561).

The circumstances of *Proctor & Gamble* are not those faced by Plaintiffs in the instant case: Plaintiff is not one of Defendants' competitors seeking to recover for injuries to competitive position. For this reason, the Court does not concur that the holding of *Proctor & Gamble* pertains to the case at bar. Furthermore, as stated above, the case that bears a nearly identical resemblance to the case currently before the Court is the *Summit* decision itself. In that case, the Fifth Circuit articulated its "target exception" with total cognizance of the situation in which plaintiffs found themselves, and yet determined that plaintiffs did not fall within the "target exception." Between *Summit* and the case at bar, Plaintiffs have altered only one aspect of their case: here they allege reliance, whereas in *Summit* they did not. This allegation of reliance, however, is not sufficient to overcome *Summit*'s holding barring Plaintiff's claim.

iii. Equity Relief

During the October 17, 2001, hearing, Plaintiff raised a new argument regarding the potential for equitable relief under RICO. Plaintiff suggested that an equitable remedy, following the Seventh Circuit case of *NOW v. Scheidler,* 267 F.3d 687 (2001), is applicable to the case at bar. (Oct. 17, 2001 Trans. at 16-18.) The Court requested briefing on the subject and the parties complied. After reviewing the briefing, the Court concludes that Plaintiff's arguments in equity do not assist the Court in determining whether Plaintiff has stated a claim upon which relief may be granted.

Plaintiff argues that *Scheidler* provides a basis for recovery that is wholly separate from both the "target exception" articulated in *Summit* and applied in *Proctor & Gamble,* and from *Summit*'s reliance requirement. According to Plaintiff, *Scheidler* gives Plaintiff a viable claim, not for damages relief, but for equitable recovery. Plaintiff concludes that thus *Scheidler* provides a separate basis for the Court's subject matter jurisdiction. (Pla. Memo. of Law in Resp. to Jan. 12, 2002 Order, at 4.) As discussed above, the Court has already determined that it has subject matter jurisdiction to consider Plaintiff's RICO claim. Thus the Court will not address Plaintiff's contention that *Scheidler* provides the Court with an alternate argument to determine that it has jurisdiction to hear the instant case. Instead, the Court is concerned with what *Scheidler* might add to the Court's assessment of the viability of Plaintiff's claim.

Relying on *In re Beef Indus. Antitrust Litig.*, 600 F.2d 1148, 1167 (5th Cir. 1979), *Associated General Contractors of California, Inc. v. California State Council of Carpenters,* 459 U.S. 519 (1983) ("*AGC*"), and *Cargill, Inc. v.*

Monfort of Colorado, Inc., 479 U.S. 104 (1986), Plaintiff argues that "[p]lainly, once Plaintiffs, at their option, claim only equity relief – *i.e.* not damages – the rationale for requiring reliance to distinguish direct from indirect or remote claimants wholly disappears. Only *traditional* proximate cause between violation and injury need be shown." *Id.* (emphasis in original.) (Pla. Reply. Memo re Jan. 16, 2002 Order at 5-7 (Dkt. No. 170); Pla. Resp. to Sur-Reply re: Jan. 16, 2002 Order at 4 (Dkt. No. 172).) The equitable relief that Plaintiff asserts is disgorgement of profits. Plaintiff thus perceives his arguments in equity as an escape from the heavy burden regarding proximate cause imposed by *Summit*.

The Court does not find this argument well taken. While Plaintiff creatively lays out a jurisdictional history designed to show that seeking equitable relief under RICO makes the standing/proximate cause requirements (and their justifications) completely different than when damages are sought, the Court does not find this supposition well supported. Plaintiff argues that because claims for equitable relief present no risk of duplicative recoveries or complex allocation problems, in contrast to treble-damages actions, the strict requirements exacted in claims for damages are sometimes relaxed. In support of this contention, Plaintiff cites *Cargill*'s determination that some factors considered in determining standing for damage relief (§ 4 of the Clayton Act) are not relevant when considering standing for equitable relief (§ 16 of the Clayton Act). *Cargill*, 479 U.S. at 111 n.6. *Cargill*'s holding, however, is not applicable to the case at bar. While the *Cargill* Court did find that, "the difference in remedy each section provides means that certain considerations relevant to a determination of standing under § 4 are not

relevant under § 16," *id.*, that finding is misapplied by the Plaintiff to the case currently before the Court. Section 16 of the Clayton Act contemplates *threatened* loss or damage, and only equitable relief is available. It is not surprising that *future* loss or damage would mandate a different, even more relaxed, standing requirement than *actual* loss or damage (addressed by § 4 of the Clayton Act). Therefore, *Cargill* does not stand for the proposition that there is a relaxation of the standing requirements. Rather, it explores the ways in which distinct – although related – causes of action affording distinct remedies rely on distinct standards. In contrast, Plaintiff has brought a claim for damages based on *actual* loss. In *Bolin,* 231 F.3d 970, the Fifth Circuit rejected a class certification requesting injunctive relief where it found that damage claims predominated. Finally, *Cargill* is naturally distinguished from the instant case because unlike the Clayton Act, the RICO statute does not expressly contemplate equity damages for private plaintiffs for actual ***or*** threatened loss.

Moreover, Plaintiff's foundational claim that equitable relief is permissible under RICO is tenuous at best. Plaintiff relies on *Scheidler* to tie its contentions together, although that case appears to be unique in its permission of equitable remedies under RICO. Even Plaintiff's partner in settlement, DuPont, criticizes Plaintiff's arguments under *Scheidler,* pointing out that:

> Before *Scheidler,* no federal court of appeals had held that private plaintiffs could seek injunctive relief under RICO. The Ninth Circuit has held that private plaintiffs may *not* seek such relief. *Religious Tech. Ctr. v. Wollersheim,* 796 F.2d 1076 (9th Cir. 1986); *cert. denied,* 479 U.S. 1103 (1987). . . . Other federal courts have in *dicta* either rejected or expressed serious doubts about

> the proposition that private plaintiffs may seek injunctive relief under RICO (*citations omitted*). . . . For these reasons, this Court should not base its subject matter jurisdiction on the shaky ground provided by *Scheidler*. . . .

(DuPont's Resp. to Jan. 16, 2002 Order (Dkt. No. 164).) To the extent that courts in the Fifth Circuit have considered equitable remedies under RICO, the idea has been dismissed. *See Bolin v. Sears Roebuck & Co.*, 231 F.3d 970, 977 n. 42 (5th Cir. 2000) ("There is considerable doubt that injunctive relief is available to private plaintiffs under RICO"); *In re Fredeman Litig.*, 843 F.2d 821 (5th Cir. 1988) (expressly adopting the reasoning of *Wollersheim* in holding that RICO does not authorize private plaintiffs to seek an injunction that would freeze the assets of defendants); *Price v. Pinnacle Brands, Inc.*, 138 F.3d 602 (5th Cir. 1998) (holding that because plaintiffs were not able to allege sufficiently injury to their business or property proximately caused by the defendant's allegedly wrongful conduct, the Fifth Circuit did not need to decide whether injunctive relief was available to private RICO plaintiffs).

Summit provides a roadmap of the factors necessary to demonstrate that plaintiff has a viable RICO claim. One of the factors, and the aspect of the instant case contested by the parties, is the requirement that the plaintiff demonstrate direct reliance on a fraudulent misrepresentation. *Summit* forecloses the possibility that a plaintiff in the position where Richard finds himself might collect under RICO; *Scheidler* does not, so far as the Court can see, answer that restriction enacted by *Summit*. For the foregoing reasons, the Court finds that Plaintiff's RICO claim does not state a claim upon which relief can be granted.

V

CONCLUSION

For the reasons discussed above, it is hereby ORDERED that Defendants' motions to dismiss for lack of subject matter jurisdiction are hereby Denied and Plaintiff's motion to certify the class (Dkt. No. 95) is DENIED and Defendants' motions to dismiss for failure to state a claim (Dkt. Nos. 87, 89, 91) are GRANTED.

Signed this 30th day of March, 2002.

/s/ David Folsom
DAVID FOLSOM
UNITED STATES
DISTRICT JUDGE

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 02-41377

D.C. Docket No. 5:00-CV-8

RICHARD R RICHARD, JR, on behalf of himself and all others similarly situated

Plaintiff-Appellant

v.

HOECHST CELANESE CHEMICAL GROUP INC, Hoechst Celanese Chemical Group; SHELL OIL COMPANY, doing business as Shell Chemical Company; HOECHST CELANESE CORPORATION, Hoechst Celanese Corporation; E I DUPONT DE NEMOURS AND COMPANY

Defendants-Appellees

Appeal from the United States District Court for the Eastern District of Texas, Texarkana.

Before WIENER, CLEMENT, and PRADO, Circuit Judges.

JUDGMENT

(Filed Dec. 19, 2003)

This cause was considered on the record on appeal and was argued by counsel.

It is ordered and adjudged that the judgment of the District Court is affirmed.

IT IS FURTHER ORDERED that defendants-appellees pay to plaintiff-appellant the costs on appeal to be taxed by the Clerk of this Court.

WIENER, Circuit Judge, concurs in part and dissents in part:

ISSUED AS MANDATE: FEB 19 2004

E.O.D. 8/30/02

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TEXARKANA DIVISION

RICHARD R. RICHARD, JR., on behalf of himself and all other similarly situated,	§	
	§	**CASE NO. 500-CV-008**
Plaintiff,	§	
vs.	§	
HOECHST CELANESE CHEMICAL GROUP, INC.; SHELL OIL COMPANY D/B/A SHELL CHEMICAL COMPANY; HOECHST CELANESE CORPORATION; and E.I. DUPONT DE NEMOURS & COMPANY,	§	**Judge David Folsom**
Defendants.	§	

FINAL JUDGMENT
(Filed Aug. 30, 2002)

Came on to be heard Plaintiff's Motion for Final judgment pursuant to Fed.R.Civ.P. 58. The Court, having considered said Motion, and the Response, if any, is of the opinion that said Motion should be granted. It is, therefore,

ORDERED, ADJUDGED and DECREED by this Court that there is no just reason for delay and this Court hereby enters a Final Judgment dismissing all of Plaintiff's claims.

SIGNED this 30th day of Aug., 2002.

/s/ [Illegible]
HONORABLE DAVID FOLSOM
U.S. DISTRICT JUDGE
PRESIDING

E.O.D. 4/23/02

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TEXARKANA DIVISION

RICHARD R. RICHARD, JR., ET AL.	§	
	§	
v.	§	5:00-CV-8
HOECHST CELANESE CHEMICAL	§	
GROUP, INC., ET AL.	§	

ORDER

(Filed Apr. 23, 2002)

In the wake of the Court's March 30, 2002, Memorandum Opinion and Order, Defendants Hoechst and Shell have requested clarification regarding the question of whether, in dismissing Plaintiff's federal law claims, the Court also dismissed Plaintiff's pendant state law claims. (Dkt. Nos. 176 and 177.) It is hereby ORDERED that having dismissed Plaintiff's federal law claims, the Court also dismisses without prejudice Plaintiff's pendant state law claims. *See* 28 U.S.C. § 1367(c)(3); *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966).

Signed this 23 day of April, 2002.

/s/ [Illegible]
DAVID FOLSOM
UNITED STATES DISTRICT
JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 02-41377

RICHARD R RICHARD, JR, on behalf of himself and all others similarly situated

Plaintiff-Appellant

v.

HOECHST CELANESE CHEMICAL GROUP INC, Hoechst Celanese Chemical Group; SHELL OIL COMPANY, doing business as Shell Chemical Company; HOECHST CELANESE CORPORATION, Hoechst Celanese Corporation; E I DUPONT DE NEMOURS AND COMPANY

Defendants-Appellees

Appeal from the United States District Court for the Eastern District of Texas, Texarkana.

ON PETITION FOR REHEARING
AND REHEARING EN BANC

(Opinion 12/19/03, 5 Cir., ___, ___ F.3d ___)

(Filed Feb. 11 2004)

Before WIENER, CLEMENT, and PRADO, Circuit Judges.

PER CURIAM:

(✓) The Petition for Rehearing is DENIED and no member of this panel nor judge in regular active service on the court having requested that the court be polled on Rehearing En Banc, (FED. R. APP. P. and 5TH CIR. R. 35) the Petition for Rehearing En Banc is also DENIED.

( ) The Petition for Rehearing is DENIED and the court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service not having voted in favor, (FED. R. APP. P. and 5TH CIR. R. 35) the Petition for Rehearing En Banc is also DENIED.

( ) A member of the court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ [Illegible]
United States Circuit Judge

Judge Benavides did not participate in the consideration of the rehearing en banc.

Wiener, Circuit Judge, would grant rehearing.

(2)

No. 03-1543

AUG 13 2004
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

RICHARD R. RICHARD, JR., on behalf of himself and all others similarly situated,
Petitioner,

v.

HOECHST CELANESE CHEMICAL GROUP, INC., SHELL OIL COMPANY d/b/a SHELL CHEMICAL COMPANY, HOECHST CELANESE CORPORATION, and E. I. DU PONT DE NEMOURS AND COMPANY,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

BRIEF IN OPPOSITION OF RESPONDENT E. I. DU PONT DE NEMOURS AND COMPANY

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QUESTIONS PRESENTED

1. Whether the Court of Appeals for the Fifth Circuit erred in finding that petitioner's claim under 42 U.S.C. § 1983 is jurisdictionally barred by the *Rooker-Feldman* doctrine as an impermissible collateral attack on two state court final judgments and is substantively meritless because of the failure to allege state action.

2. Whether the Court of Appeals for the Fifth Circuit erred in holding that, even assuming *arguendo* that disgorgement is a remedy available in private civil RICO actions, petitioner was not entitled to a disgorgement remedy under the circumstances of this case because there was no allegation of future misconduct.

CORPORATE DISCLOSURE STATEMENT PURSUANT TO RULE 29.6

Pursuant to Supreme Court Rule 29.6, Respondent E. I. du Pont de Nemours and Company states that it has no parent corporations and that there are no publicly held companies that own more than 10% of its stock.

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IN THE

Supreme Court of the United States

No. 03-1543

RICHARD R. RICHARD, JR., on behalf of himself and all others similarly situated,
Petitioner,

v.

HOECHST CELANESE CHEMICAL GROUP, INC., SHELL OIL COMPANY d/b/a SHELL CHEMICAL COMPANY, HOECHST CELANESE CORPORATION, and E. I. DU PONT DE NEMOURS AND COMPANY,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF IN OPPOSITION OF RESPONDENT E. I. DU PONT DE NEMOURS AND COMPANY

INTRODUCTION

This petition arises out of petitioner's effort to mount a federal court collateral attack on two state court judgments that approved national class action settlements of consumer products lawsuits involving polybutylene plumbing. Applying the due process standards applicable to class actions set forth by this Court, the respective state courts presiding over the two class action settlements determined that due process had been afforded absent class members (*i.e.*, that notice was proper, representation was adequate and thus that nationwide settlement classes could be certified).

Petitioner ultimately sought to cast his collateral attack on these judgments as a claim under 42 U.S.C. § 1983. However, in order to prevail on his § 1983 claim, he would have to overturn the state court judgments that disposed of his due process argument. Such an attack upon a state court judgment in a federal district court is jurisdictionally barred by the *Rooker-Feldman* doctrine. The federal courts have consistently held that the *Rooker-Feldman* doctrine bars federal court review of state class action settlements. Petitioner is unable to identify even a hint of conflict among the circuit courts on that point.

Petitioner's effort to state a § 1983 claim for denial of due process was likewise defective, for equally uncontroversial reasons. Petitioner was unable to show state action by respondents, private actors. Under this Court's clear precedents, a private party does not become a state actor liable for a constitutional violation under § 1983 by persuading a state court judge to issue an allegedly erroneous ruling on a constitutional issue. The Fifth Circuit properly recognized that petitioner's "blatant nonconformity with the requirements of § 1983 [] suggests that he has merely cast his complaint in the form of a civil rights action in an attempt to circumvent *Rooker-Feldman*." Pet. App. 11.

Petitioner's attempt to obtain federal court jurisdiction by transforming his consumer products lawsuit into a fraud claim under the Racketeer Influenced and Corrupt Organization Act ("RICO"), 18 U.S.C. §§ 1961, *et seq.*, was equally unsuccessful. The Fifth Circuit was willing, *arguendo*, to indulge petitioner the triple assumptions that a private party can avail itself of equitable remedies under RICO, that "disgorgement" of profits is an equitable remedy potentially available in this context, and that a party pursuing equitable remedies does not have to show reliance on a misrepresentation. But fully consistent with the only other circuit court to consider this issue, the Fifth Circuit held that an equitable remedy is not

available under RICO where there is no ongoing or future misconduct to prevent because the consumer products at issue have not been manufactured or marketed for years.

COUNTERSTATEMENT

A. The *Cox* and *Spencer* Settlements.

1. Respondents Shell Oil Company ("Shell"), Hoechst Celanese Corporation ("Celanese"), and E. I. du Pont de Nemours and Company ("DuPont") produced raw materials sold to other manufacturers who used those materials to make plumbing components. Shell sold polybutylene resin to manufacturers who extruded it into pipes for use in plumbing systems. Celanese and DuPont sold acetal plastic resin to manufacturers who molded it into fittings used to connect pipes in plumbing systems. DuPont ceased marketing and selling its raw material for use in polybutylene plumbing in the late 1980s.

2. In November 1994, *Spencer v. Shell Oil Co.*, No. CV-94-047 (Ala. Cir. Ct., Greene County), a nationwide class action, was filed against respondents in Alabama state court alleging defects associated with polybutylene plumbing. In May 1995, DuPont agreed to a national class action settlement in *Spencer*. Under the terms of the *Spencer* settlement, DuPont agreed to pay class members 10% of replumbs and physical damage to tangible property caused by leaks. DuPont agreed to provide $120 million to fund these costs. The $120 million figure is a "soft cap," meaning that if costs exceed this figure, DuPont may provide additional funding. If DuPont declines to provide additional funding, any unpaid class members will retain their rights to pursue claims against DuPont. R. 838.[1]

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[1] Citations to "R." refer to the record on appeal in the Fifth Circuit.

3. In June 1995, *Cox v. Shell Oil Co.*, No. 18,844 (Tenn. Ch. Ct., Obion County) ("*Cox*"), a nationwide class action, was filed in Tennessee state court against Shell and Celanese. (DuPont was not a party.) The *Cox* court preliminarily approved a nationwide class settlement with Shell and Celanese in August 1995. Under the settlement agreement, Shell and Celanese agreed to fund replumbs and physical damage to tangible property of the class members caused by a qualifying leak and to provide $850 million in a "soft cap" fund.

Class counsel in each of the *Cox* and *Spencer* actions filed objections to the other settlement. Other parties also filed objections. In October and November 1995, *Cox* and *Spencer* class counsel and respondents participated in a mediation conducted by California Superior Court Judge Robert Silver.[2] The mediation resulted in some changes to the *Cox* settlement, including an increase in the initial funding to $950 million. Judge Silver noted that "[b]efore I would agree to recommend the settlement, it would have to meet a class fairness standard . . . ." *Meers v. Shell Oil Co.*, No. M-30590 (Cal. Super. Ct., Monterey County Nov. 8, 1995) (recommendation re: Spencer/Cox settlement).

4. The *Spencer* court conducted a fairness hearing and approved the settlement on November 17, 1995. The court specifically addressed the appropriate due process considerations, finding the settlement "fair, adequate. and reasonable to the Plaintiffs." App. 16a-17a. The court ruled that the $7.4 million notice program had "accurately described the pending Action" and that "the means of disseminating the notice was the best practicable, reasonably calculated, under all the circumstances, to apprise interested parties of the

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[2] Judge Silver was then presiding over yet another putative statewide class action in California, *Meers v. Shell Oil Co.*, No. M-30590 (Cal. Super. Ct., Monterey County). The *Cox* and *Spencer* courts were aware of Judge Silver's mediation efforts.

pendency of the Action and their rights therein."[3] *Id.* at 17a. The court considered and overruled objections to the adequacy of representation, finding that the class representatives would "fairly and adequately represent and protect the interests of all class members, and not put any perceived individual interests above those of the class." *Id.* at 10a.

The *Spencer* court's order approving the class settlement released DuPont from any claims by a member of the settlement class, "whether known, unknown, foreseen, unforeseen, patent or latent, . . . arising from, resulting from, or in any manner relating to polybutylene plumbing systems." *Id.* at 19a-20a. The release further enjoined members of the settlement class from "commencing or participating in any action, either directly, individually, representatively, or in any capacity, against [DuPont] arising from, resulting from or in any manner relating to polybutylene plumbing systems or the subject of the above-captioned Action."[4]

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[3] The record before the Alabama court included an estimate from an independent notice expert that the paid advertising program reached 96.6 percent of adults nationwide and that they were exposed to the message an average of 4.9 times. Notice included (1) direct mailing of over 2.5 million notices to individuals; (2) a massive national campaign consisting of national network and cable television advertisements, radio advertisements, an extensive print campaign that targeted national, regional, and local publications, and the mailing of information kits to numerous membership organizations with interests related to polybutylene plumbing; and (3) a non-paid or "earned media" campaign, such as press releases and video news releases. Two supplemental notice programs were conducted in 1999 and 2004.

[4] The Alabama court "reserve[d] jurisdiction, without affecting the finality of this Order, over: (a) implementation of this Settlement Agreement; (b) enforcing and administering this Order as against any of the Settling Parties or Settlement Class Members; (c) enforcing and administering the Settlement Agreement, including any releases in connection therewith; and (d) other matters related or ancillary to the foregoing." App. 20a.

5. The Tennessee court similarly conducted a fairness hearing on the *Cox* settlement, giving that class settlement final approval on November 17, 1995. The *Cox* court carefully addressed the due process issues. The court characterized the notice program as "singularly comprehensive and creative," found that it provided the best notice practicable under the circumstances, and specifically ruled that it "met and exceeded" minimum due process requirements. App. 36a, 40a. With respect to adequacy of representation, the court held that "*Cox* Class Counsel maintained the highest standards of professionalism and advocacy in protecting and promoting the interests of the Class throughout the prosecution and settlement of this case." *Id.* at 45a.

B. The Proceedings Below.

In 1997, petitioner purchased a used mobile home containing polybutylene plumbing. On January 19, 2000, he filed the instant federal court action in the United States District Court for the Eastern District of Texas. The original complaint alleged conspiracy, strict liability, negligence, and breach of implied warranties arising from polybutylene plumbing—claims resolved and released in *Cox* and *Spencer*.[5]

After respondents moved to dismiss for lack of subject matter jurisdiction because petitioner's claims were based solely on state law, petitioner alleged violations of RICO and the Due Process Clause of the United States Constitution.[6]

On June 27, 2000, the Fifth Circuit decided *Summit Properties, Inc. v. Hoechst Celanese Corp.*, 214 F.3d 556 (5th

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[5] Petitioner could have, but did not, file a claim under the *Cox* and *Spencer* settlements seeking recovery for his alleged plumbing damages.

[6] Petitioner also added a Lanham Act claim, which he voluntarily dismissed when respondents pointed out that consumers have no standing to sue under the Lanham Act.

Cir. 2000), a case brought against respondents by some of the same counsel representing petitioner, and which alleged RICO violations involving polybutylene plumbing. Applying *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258 (1992), which held that a RICO plaintiff must show that defendant proximately caused its injury, the *Summit* court dismissed the case because plaintiffs had not alleged reliance on any misrepresentations by respondents. *Summit*, 214 F.3d at 560.

Respondents moved to dismiss petitioner's RICO claims in this case because they were identical to those dismissed in *Summit*. Respondents also moved to dismiss petitioner's due process claim as barred by the *Rooker-Feldman* doctrine. On October 2, 2000, attempting to avoid the holding of *Summit*, petitioner amended his RICO claims to include an allegation of reliance on alleged misrepresentations by respondents.

Petitioner filed a RICO statement of facts on March 15, 2001. That statement demonstrated that—contrary to his earlier allegations—petitioner had *not* relied on any misrepresentations by respondents; indeed, he was *unaware* of any representations by respondents. Respondents immediately renewed their motions to dismiss based on *Summit*.

Petitioner's effort to contrive a RICO claim evolved further during an October 17, 2001 hearing, during which he argued that he could avoid the obligation to allege reliance and proximate cause, as required by *Holmes* and *Summit*, by instead pursuing equitable remedies. The particular "equitable remedy" he sought was monetary: "disgorgement" of respondents' "past profits."

With respect to the due process allegations, although no version of his complaint specified a § 1983 claim, petitioner's June 14, 2001 brief asserted a violation of 42 U.S.C. § 1983 based on his allegations that "Defendants conspired to

corruptly use state courts to enforce a legal process that violated Plaintiffs due process rights." R. 930.

C. The Decisions Below.

On March 24, 2002, the district court dismissed petitioner's § 1983 claim for lack of subject matter jurisdiction. The court noted that, under the *Rooker-Feldman* doctrine, "Plaintiff cannot seek to have this Court review the final judgments of the *Cox* and *Spencer* Courts." Pet. App. 35. Although "framed as a § 1983 claim," the petitioner's claim was, in effect, a collateral attack on the state court judgments foreclosed by *Rooker-Feldman*. *Id.*

With respect to petitioner's RICO claims, the district court held that it had subject matter jurisdiction, but found that petitioner's claims failed under *Holmes* and *Summit* because petitioner had not alleged reliance on any misrepresentation. *Id.* at 45. The district court also held that petitioner was not exempted from showing reliance by claiming that disgorgement was an appropriate remedy.

The United States Court of Appeals for the Fifth Circuit affirmed. The court held that petitioner's due process claims under § 1983 "indisputably denounce the express findings" of the *Cox* court on the due process issues and "would result in setting aside a state court judgment," *id.* at 10, and therefore were barred by the *Rooker-Feldman* doctrine.

The Fifth Circuit also rejected petitioner's effort to plead a claim under § 1983, finding that petitioner had "attempted to circumvent the *Rooker-Feldman* doctrine by intertwining a groundless § 1983 claim with the state court findings." *Id.* at 15. Because petitioner's claims against the private defendants did not involve state action, they could not form the predicate for a constitutional claim under 42 U.S.C. § 1983.

With respect to petitioner's claim seeking disgorgement under RICO, the Court of Appeals assumed, *arguendo*, that a private party could obtain equitable relief under RICO without showing reliance on a misrepresentation. The court nevertheless found that disgorgement was not available as a remedy to petitioner under the facts of this case because 18 U.S.C. § 1964(a) "establishes that equitable remedies [under RICO] are available only to prevent ongoing and future conduct." *Id.* at 17. Because respondents had ceased marketing the products at issue years earlier, petitioner "fail[ed] to argue that disgorgement would 'prevent and restrain' similar RICO violations in the future." *Id.*

REASONS FOR DENYING THE PETITION

The petition presents no question warranting this Court's review. Applying this Court's prescribed standards for judging due process in the context of a class action (as set forth in *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985)), the *Cox* and *Spencer* courts that approved the class settlements specifically considered and rejected the due process arguments that petitioner now raises. The judgments of those courts are entitled to full faith and credit. Because petitioner's § 1983 claim directly attacks those judgments, it is barred by the *Rooker-Feldman* doctrine. Moreover, petitioner's § 1983 claim against respondents cannot succeed because petitioner cannot show "state action." Private parties do not become "state actors" because they persuaded a state court to make what petitioner asserts is an erroneous due process determination. There are no circuit decisions in conflict with the decision of the Fifth Circuit on either of these points.

Petitioner's effort to present an issue to this Court regarding the precise scope of one form of equitable relief potentially available under RICO is equally unavailing. Assuming *arguendo* that disgorgement is available under

RICO to private plaintiffs, the plain language of the RICO statute demonstrates that disgorgement is unavailable as an equitable remedy under RICO where it would not prevent future misconduct. The only other circuit court to address a similar issue reached an identical conclusion. Even on the narrow, fact-bound issue that petitioner proffers, there is no conflict in the circuits.

I. THE FIFTH CIRCUIT PROPERLY FOUND THAT PETITIONER'S § 1983 CLAIM CANNOT BE SUSTAINED.

Petitioner bases his § 1983 claim on the theory that the private defendants in the class actions—respondents here—deprived him of due process by leading the state courts into erroneous decisions on the due process issue. Pet. 7, 18. The Fifth Circuit rejected this claim. First, it found that petitioner's request to have a federal court review the Tennessee and Alabama state courts' determinations that due process had been afforded absent class members was barred by the *Rooker-Feldman* doctrine. Second, the Fifth Circuit found that petitioner could not present a colorable claim under § 1983 because private defendants are not rendered state actors merely by seeking and obtaining judgments from state courts.

Both conclusions are clearly correct and are not in conflict with the law of any other circuit.

A. The *Rooker-Feldman* Doctrine Bars Petitioner's § 1983 Claim Because The Underlying Class Action Settlements Afforded Class Members Due Process.

1. The *Rooker-Feldman* doctrine recognizes a fundamental principle: The grant of federal question jurisdiction to the federal district courts does *not* give those courts the authority and jurisdiction to sit in review of the final judgments of state

courts, even on federal questions.[7] *Rooker v. Fid. Trust Co.*, 263 U.S. 413, 415 (1923). To the contrary, state courts are bound by federal law; state appellate courts are fully capable of evaluating violations of federal and constitutional law. Therefore, only the United State Supreme Court may undertake federal review of final state court judgments, even those involving federal and constitutional law. *See D.C. Ct. App. v. Feldman*, 460 U.S. 462, 482 (1983) (holding that "a United States District Court has no authority to review final judgments of a state court in judicial proceedings"). Even if a state court is alleged to have decided a matter of federal constitutional law incorrectly, the *Rooker-Feldman* doctrine forecloses review in the lower federal courts.[8]

The Fifth Circuit here, following the lead of the Seventh Circuit in *Kamilewicz v. Bank of Boston Corp.*, 92 F.3d 506, 510-11 (7th Cir. 1996), and the Eighth Circuit in *Snider v. City of Excelsior Springs, Mo.*, 154 F.3d 809, 812 (8th Cir. 1998), held that *Rooker-Feldman* bars precisely this type of collateral attack on a class action judgment. Pet. App. 8. *See also In re General Motors Corp. Pick-Up Truck Fuel Tank Products Liab. Litig.*, 134 F.3d 133, 143 (3d Cir. 1998) (refusing to examine the due process afforded to class members in a Louisiana class action because "*Rooker-Feldman* bars exactly this sort of intermediate appellate review of state

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[7] The *Rooker-Feldman* doctrine is a jurisdictional bar—unlike *res judicata* or full faith and credit, which are traditionally raised as affirmative defenses. Where a claim is subject to dismissal both as a matter of *res judicata* and *Rooker-Feldman*, *Rooker-Feldman* typically provides the grounds for dismissal because as a jurisdictional doctrine, it is addressed first.

[8] *See ITT Corp. v. Intelnet Int'l Corp.*, 366 F.3d 205, 212 (3d Cir. 2004) (whether the state court's decision was correct as a matter of federal law is irrelevant under *Rooker-Feldman*); *GASH Assocs. v. Vill. of Rosemont*, 995 F.2d 726, 728 (7th Cir. 1993) (*Rooker-Feldman* applies even when state court's judgment is erroneous and based on unconstitutional procedures) (citing *Ritter v. Ross*, 992 F.2d 750, 755 (7th Cir. 1993)).

court judgments"). There is no circuit that has held or suggested to the contrary.

Here, the *Cox* and *Spencer* courts, applying *Shutts*, each examined whether absent class members had been afforded due process in the form of adequate notice and adequate representation by both the class representatives and class counsel. For example, the *Spencer* court ruled that "the means of disseminating the [class] notice was the best practicable, reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the Action and their rights therein." App. 17a. It also considered objections to the adequacy of representation, finding that the class representatives would "fairly and adequately represent and protect the interests of all class members, and not put any perceived individual interests above those of the class." *Id.* at 10a.

The *Cox* court likewise addressed the due process issues. The *Cox* court described notice to class members as "singularly comprehensive," found that it provided the best notice practicable under the circumstances, and held that it "met and exceeded" minimum due process requirements. *Id.* at 36a, 40a. With respect to adequacy of representation, the court held that "*Cox* Class Counsel maintained the highest standards of professionalism and advocacy in protecting and promoting the interests of the Class throughout the prosecution and settlement of this case." *Id.* at 45a.

In light of these determinations, the Fifth Circuit had little difficulty concluding that petitioner's claim that the *Cox* court violated absent class members' due process rights was barred by *Rooker-Feldman*. Petitioner's allegations that absent class members were deprived of due process "indisputably denounce the express findings of the *Cox* state court. Because his challenge would result in setting aside a state court judgment, *Rooker-Feldman* seems to bar federal review of these findings." Pet. App. 10.

2. Petitioner asserts that the Fifth Circuit erred by using the *Rooker-Feldman* doctrine to give the judgments of the *Cox* and *Spencer* courts *greater* preclusive effect than they would be given in the states where they were rendered.[9] Pet. 4-5. Petitioner asserts that he would be free to raise a due process challenge to those judgments in any state court; *i.e.*, that full faith and credit would not bar a due process challenge to those judgments. On that basis, he contends that the Fifth Circuit improperly applied the *Rooker-Feldman* doctrine to preempt his right to have a federal court examine whether the state court had, in fact, afforded absent class members due process. *Id.*

Petitioner is wrong both in his description of the Fifth Circuit's holding and on the law.

The Fifth Circuit did not give the judgment of the *Cox* court a broader effect under the *Rooker-Feldman* doctrine than it would have as a matter of full faith and credit, as petitioner claims. To the contrary, the Court of Appeals recognized at the outset that "the *Rooker-Feldman* doctrine only applies insofar as a state court judgment merits full faith and credit."[10] Pet. App. 8-9. This, in turn, required the court issuing the judgment to have considered the relevant due process issues. *See id.* at 9 (noting that the court must ensure that "class members have received adequate notice, representation, and an opportunity to opt-out" and that the settlement judgment has no preclusive effect if the court does not comply with these procedures). Thus, the Fifth Circuit

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[9] A court entertaining a collateral attack on a state court judgment must determine, before granting preclusive effect to that judgment, whether the law of the state in which the judgment was rendered would grant preclusive effect to the judgment. *See Marrese v. Am. Acad. of Orthopaedic Surgeons*, 470 U.S. 373,-381 (1985).

[10] The full faith and credit principle is set forth in Article IV, Section 1 of the United States Constitution and codified in the Full Faith and Credit Act, 28 U.S.C. § 1738.

did *not* give the state court judgment broader binding effect under *Rooker-Feldman* than it would have as a matter of full faith and credit.

Moreover, petitioner makes a fundamental mistake in assuming that the *Cox* court's due process determinations would be subject to collateral attack in state court on due process grounds. Pet. 10. To the contrary, the law is clear that if the court presiding over a class settlement conducted the due process inquiry mandated by this Court's cases, including *Shutts*—as both the *Cox* and *Spencer* courts did here—the state court's determination that the class could properly bind absent class members is entitled to full faith and credit. Its determination is not subject to second-guessing by any subsequent court.[11] Significantly, each of the several state courts that has considered whether the *Cox* class action settlement and ensuing judgment is entitled to full faith and credit, notwithstanding efforts to mount collateral due process attacks on that judgment, has rejected such challenges.

It is the responsibility of the *settlement court* to determine whether absent class members were afforded due process. *See generally Matsushita Elec. Indus. Co. v. Epstein*, 516 U.S. 367 (1996). As this Court made clear in *Matsushita*, a "judgment entered in a class action, like any other judgment entered in a state judicial proceeding, is presumptively entitled to full faith and credit under the express terms of the Act." *Id.* at 374. In that case, this Court found that the state court judgment approving the settlement should be afforded full faith and credit. The Court did so by referencing the findings of the Delaware courts on the due process issues,

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[11] If petitioner were correct, then no class settlement would ever be effective: parties seeking to bring claims already resolved by a prior class settlement could simply claim that the presiding court had erred in judging the adequacy of notice or class representation.

rather than by independently determining whether due process requirements had been met. *Id.* at 378-79.[12]

As long as the state court in which the class action was pending had procedures in place to protect absent class members' due process rights, *Hansberry v. Lee*, 311 U.S. 32, 42-43 (1940), its judgment and express determination that the class was properly certified and notified is entitled to full faith and credit. *See Grimes v. Vitalink Communications Corp.*, 17 F.3d 1553, 1558 (3d Cir. 1994) (rejecting absent class members' collateral attack on the adequacy of representation because opportunity to appeal within state court system and United States Supreme Court "granted all the process that was due"); *Nottingham Partners v. Trans-Lux Corp.*, 925 F.2d 29, 33 (1st Cir. 1991) (objections to determinations of certifying court had to be remedied on appeal to state supreme court or United States Supreme Court, rather than by recourse to the "federal courts in the vain pursuit of back-door relief"); *Fine v. Am. Online, Inc.*, 743 N.E.2d 416, 420 (Ohio Ct. App. 2000) ("[m]odern constitutional jurisprudence requires that the absent class members' rights to due process be protected not by substantive collateral review, but, rather, by the application of

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[12] It is only in those circumstances, typified by *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997), where some specific subclass, such as a class of *future* claimants, cannot receive notice, participate in the case, or be fairly represented by those who do appear in the litigation, that significant due process questions may arise.

This is not such a case, despite petitioner's assertion that the *Cox* and *Spencer* class representatives could not adequately represent him because he was a "future class member." Pet. 6. While petitioner apparently believes that "future class member" is the magic phrase that triggers the due process concerns discussed in *Amchem*, this case does *not* present the situation presented in *Amchem*. Petitioner is not a member of a discrete subclass of persons whose claims had not yet arisen, who could not receive notice, and whose interests could not be adequately represented by those parties that did participate in the case.

appropriate procedures in the certifying court"). Here, the *Cox* and *Spencer* courts had such procedures in place to protect the due process rights of absent class members.[13]

Therefore, contrary to petitioner's assertions and assumptions (Pet. 12), a settlement court's explicit determination that due process has been afforded to all class members cannot be collaterally challenged. *See Epstein v. MCA, Inc.*, 179 F.3d 641, 648 (9th Cir. 1999); *Grimes*, 17 F.3d at 1558; *Nottingham*, 925 F.2d at 33. Where that court conducts the proper due process inquiry, absent class members' due process rights to notice and adequate representation are protected *not* by collateral review of the state court's judgment in a federal district court or the courts of another state, but rather by appeal within the state court system, with ultimate federal review in the United States Supreme Court.[14]

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[13] In asserting that the settlement courts' treatment of absent class members raises serious due process issues in this case, petitioner cites *Shutts*, *Amchem*, and *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999). Pet. 13, 19. But those cases did *not* involve a collateral attack on, but rather a direct appeal of, a class action judgment. Indeed, *Shutts* emphasizes that it is the *certifying court* that is charged with protecting the rights of absent class members. *See Shutts*, 472 U.S. at 809.

[14] Petitioner's claim that he did not personally receive notice of the *Cox* and *Spencer* settlements does not change the analysis. This Court long ago explained in *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950), that actual notice is not required in every instance. To the contrary, what due process requires is "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Id.* at 314. *Mullane* and its progeny established that due process requires no more than notice that is reasonable and appropriate given "the practicalities and peculiarities of the case." *Id.*

Moreover, the nature of notice in a class action setting assumes that actual notice might not be received by *some* potential parties in interest. The premise of the class action is that those parties who are not reached by notice, and who do not appear in the action, share common interests with those who *do* appear, either as class representatives or otherwise.

Petitioner also asserts that he is free to collaterally attack the *Cox* and *Spencer* settlements because he was not a party to those cases. Pet. 6, 15. This argument ignores the fundamental purpose of the class action mechanism. As this Court recognized in *Shutts*, the *essence* of the modern class action is the ability to bind absent class members, provided that due process requirements are satisfied. *See Shutts*, 472 U.S. at 811-12 (state court may exercise jurisdiction over non-resident members of plaintiff class as long as the court provides minimal procedural due process protection in the form of notice, an opportunity to be heard and participate, and a right to opt out from the class); *see also Hansberry*, 311 U.S. at 40-41 (class action is exception to the rule that one cannot be bound by judgment *in personam* in a litigation unless one was made a party in the traditional sense).

Therefore, as petitioner himself concedes, the issue whether he should be deemed a "party" to the *Cox* settlement depends on "whether the state court obtained jurisdiction over absent class members by applying procedural rules mandated by Tennessee law *and* the Constitution." Pet. 17. However, petitioner fails to acknowledge that the *Cox* and *Spencer* courts already made this determination. Therefore, this is not a matter for the federal courts to decide in the first instance, let alone to decide by way of review of the state court determination. Indeed, allowing a federal district court to review a state court's determination that due process had been afforded absent class members is precisely the type of federal court review of state court judgments barred by the *Rooker-Feldman* doctrine.

See Shutts, 472 U.S. at 809. Therefore, even if notice does not reach particular individuals, many others, with virtually identical interests and incentives (as determined by the court), will have received actual notice and can represent the interests of those parties who did not receive notice.

Although petitioner cites a number of decisions in which *Rooker-Feldman* was held *not* to apply on the particular facts of the case (Pet. 13-17), *none* of those cases involve the question presented here: Whether in the guise of a § 1983 claim alleging due process violations, a lower federal court may review a state court's judgment that determined that class certification was proper because all due process considerations were met.

B. Petitioner's § 1983 Claim Fails Because There Is No State Action.

The Fifth Circuit also examined petitioner's § 1983 "claim" on the merits, paying close attention to whether petitioner could show the requisite "state action." After conducting that examination, the Fifth Circuit recognized petitioner's § 1983 claim as a contrivance. Specifically, the Fifth Circuit concluded Richard's "blatant nonconformity with the requirements of § 1983 . . . suggests that he has merely cast his complaint in the form of a civil rights action in an attempt to circumvent *Rooker-Feldman*." Pet. App. 11. *See also id.* at 15. ("Richard has attempted to circumvent the *Rooker-Feldman* doctrine by intertwining a groundless § 1983 claim with the state court findings.") Indeed, in his multiple complaints in the district court, petitioner did not cite § 1983, much less attempt to plead facts sufficient to describe a cause of action under § 1983.

To allege a cause of action under 42 U.S.C. § 1983, a plaintiff must show that the defendant is a "state actor;" *i.e.*, that the defendant acted "under color of state law." Pet. App. 11 (citing this Court's cases). In this case, the Fifth Circuit applied the uncontroversial principle that a private party does not become a "state actor" merely by causing a court to take an unlawful or unconstitutional action. *Id.* at 14. Rather, applying the precedents of this Court—including *Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982), and *Dennis v.*

Sparks, 449 U.S. 24, 28 (1980) —the Fifth Circuit held that only if a court official (*i.e.*, state employee) consciously and jointly participates with a private party in a single scheme can it be said that the private party's actions are "state action." Merely "resorting to the courts and being on the winning side of a lawsuit does not make a party a co-conspirator or a joint actor with the judge." Pet. App. 14, quoting *Sparks*, 449 U.S. at 28.

In the face of these precedents and elementary principles, petitioner offers an "innocent agent" theory, pursuant to which he argues that liability should be imposed if a private party causes a state employee to deprive someone of his or her civil rights. Pet. 18. In support of his "innocent agent" theory, petitioner points to 18 U.S.C. § 2(b), which *statutorily* imposes criminal liability for causing a crime to be committed. Petitioner then cites three criminal law decisions that he says recognize the "innocent agent" principle in implementing that statutory directive. *See United States v. Rashwan*, 328 F.3d 160 (4th Cir. 2003) (criminal case arising out of fraudulent immigration documents); *United States v. Lester*, 363 F.2d 68 (6th Cir. 1966) (criminal civil rights prosecution); *United States v. Smith*, 584 F.2d 731 (5th Cir. 1978) (violation of firearms record-keeping regulations). Suffice it to say that the criminal law statute on which petitioner relies has no application to civil liability under § 1983.

Petitioner has not identified any conflict among the Circuits.[15] Instead, he is complaining about a consistent refusal by the federal courts and this Court to export a specific, statutory criminal law principle to civil cases.

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[15] *Smith* (which petitioner relies upon as applying the innocent agent theory, albeit in the context of a criminal case) is itself a Fifth Circuit decision, thus demonstrating that Fifth Circuit law is fully consistent with the law of other Circuits on this point.

Petitioner asserts that this case involves duplicity. Petitioner says that "corrupt class counsel" deceived and manipulated the state court judges in the *Cox* and *Spencer* cases, thus transforming class counsel—private parties—into state actors. Pet. 18. To accept the theory that a *private party*'s improper actions become state action if the private party uses wrongful means in persuading a state court judge to agree with its position would render meaningless the standards of *joint* participation (by state officials and private parties) that this Court established in cases such as *Lugar* and *Sparks*. Under those precedents, there is simply no constitutional remedy under § 1983 for the actions of private parties.

Petitioner's second theory of state action (raised for the first time in his petition) is that "[a]pproval of a settlement by a state court constitutes 'state action.'" Pet. 18-19. This assertion, while true enough, does not advance petitioner's argument. Clearly, state court judges are state actors; yet petitioner did not bring his claims against any state judicial officials. The question here is whether the *respondents*, who are not state employees, are properly deemed state actors. Absent some joint action with the state court officials, they remain private parties.

Finally, petitioner asserts (for the first time in his petition) that the record in the *Cox* settlement "raises the substantial possibility of judicial malfeasance (bribery)." Petitioner makes his bald assertion of judicial corruption without any factual reference or support.[16] *See id.* at 7. It is conceivable

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[16] Petitioner's new claims of bribery were not raised in his pleadings below and expressly conflict with his previous descriptions of the role played by the *Cox* court. For example, in his second amended complaint, petitioner alleged that Shell's counsel "concealed from the *Cox* court" the fact that it took conflicting positions before another court. R. 508. In his reply brief before the Fifth Circuit, petitioner alleged "improprieties, irregularities, and misconduct through the actions of an innocent agent; in this case, the state judge." Likewise, petitioner states that "[t]he innocent

that a class member could state a valid § 1983 claim by alleging that class counsel bribed a state court judge to approve a collusive class settlement—making class counsel and the judge parties to a single corrupt scheme—and that such a claim of collusion and corruption would not be barred by the *Rooker-Feldman* doctrine. But petitioner has not alleged *any* facts in this case, in either the district court or the Fifth Circuit, to support the assertion of bribery and corruption that he casually tenders in his petition.

II. THE FIFTH CIRCUIT'S DISMISSAL OF PETITIONER'S RICO CLAIM RAISES NO QUESTIONS THAT WARRANT REVIEW BY THIS COURT.

The RICO issue that petitioner seeks to posture for this Court's review concerns the precise circumstances under which disgorgement of profits might be available to a private party as an equitable remedy under RICO. The availability of particular forms of equitable relief turns in most instances on the factual setting in which relief is sought, as it does here. Indeed, the novelty and narrowness of the question that petitioner seeks to present to this Court is highlighted by the number of suppositions and assumptions that the Fifth Circuit had to indulge even to reach the disgorgement question that petitioner tenders.[17] For example, the Fifth Circuit assumed

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agent here, on one theory of the litigation, was the state court judge. Corrupt class counsel willfully deceived and manipulated the judge into approving a collusive settlement . . . ." Pet. 18. Petitioner's new bribery allegation appears to be nothing more than his latest attempt to recast his § 1983 claim in order to maneuver around the binding effect of the *Cox* and *Spencer* settlements.

[17] In addition to assuming that equitable remedies are available to civil RICO plaintiffs, it is necessary to make the following highly questionable

(without evaluating whether it were true) that equitable remedies are available to a private litigant under RICO. *See Scheidler v. Nat'l Org. for Women, Inc.*, 537 U.S. 393 (2003) (reserving on that question).[18] It further had to assume that the remedy would be available to a party that could not allege that it had been proximately injured by any conduct of defendants. But even giving petitioner the benefit of the doubt on these questions (as the court below did), the Fifth Circuit decided the disgorgement issue in accordance with the plain language of the statute, and in a manner consistent with the decision of the only other Court of Appeals that has addressed a similar issue (as well as a recent district court decision).[19]

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legal assumptions in order to even consider petitioner's disgorgement argument:

> (1) a private party alleging fraud in connection with a RICO claim need not meet the proximate cause requirements imposed by *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258 (1992), if he seeks an equitable remedy;
>
> (2) the rule in (1) above would apply even if the plaintiff were seeking a *monetary* equitable remedy, such as disgorgement;
>
> (3) a private party (as opposed to public party) is entitled to seek a windfall monetary remedy of disgorgement of profits; and
>
> (4) as a matter of election of remedies, a plaintiff can obtain disgorgement after already receiving damages for the same transactions via a class settlement (and a defendant can be forced to disgorge profits after already having paid damages).

[18] Although petitioner asserts that this case provides the Court with an opportunity to address whether equitable remedies are available to private litigants under RICO (Pet. 20, 23), both the district and appellate courts below declined to rule on the issue. Instead, they assumed (in petitioner's favor) that such remedies might be available, but found they were not available to petitioner under the circumstances of this case.

[19] Petitioner's RICO claims are also foreclosed for two additional reasons. First, petitioner's RICO causes of action are based on the allegation that respondents formed a "Polybutylene Group" that conspired "to

Petitioner maintains that he may use the equitable remedy of disgorgement to recover the respondents' past profits obtained from the alleged RICO violations, notwithstanding that the class action settlements already provided for damages

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fraudulently advertise and sell polybutylene systems that they knew to be unsuitable for potable water." R. 502. These allegations are identical to the factual allegations upon which the *Cox* and *Spencer* class actions were premised. Thus, these claims were released as part of the *Cox* and *Spencer* settlements. App. 19a, 24a.

Second, petitioner's RICO claims are precluded by the doctrine of *res judicata*. "[U]nder elementary principles of prior adjudication a judgment in a properly entertained class action is binding on class members in any subsequent litigation." *Cooper v. Fed. Reserve Bank of Richmond*, 467 U.S. 867, 874 (1984); *see also Nevada v. United States*, 463 U.S. 110, 129-30 (1983) ("[T]he doctrine of *res judicata* provides that when a final judgment has been entered on the merits of a case, '[i]t is a finality as to the claim or demand in controversy, concluding parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose'") (quoting *Cromwell v. County of Sac*, 94 U.S. 351, 352 (1876)).

The elements of *res judicata* are clearly met in this instance. Final judgments were entered in the state court proceedings. *See* App. B, C. Petitioner is a member of the classes defined in *Cox* and *Spencer* and, therefore, bound by those judgments. *See* Restatement (Second) of Judgments § 41, cmt. e (1980) ("[when] . . . a class action is authorized under rules such as Rule 23 of the Federal Rules of Civil Procedure, persons within the class are bound by a judgment for or against the representative"). Petitioner's RICO claims arise from the same transactions and occurrences alleged in *Cox* and *Spencer*. *See Norman v. Niagara Mohawk Power Corp.*, 873 F.2d 634 (2d Cir. 1989) (RICO claims barred by *res judicata* where based on same transactions and occurrences alleged in prior civil rights suits); *Car Carriers, Inc. v. Ford Motor Co.*, 789 F.2d 589 (7th Cir. 1986) (RICO claims barred by *res judicata* where based on same transactions and occurrences alleged in prior antitrust action). The *Cox* and *Spencer* plaintiffs could have brought RICO claims in the state court, *see Tafflin v. Levitt*, 493 U.S. 455 (1990) (state courts possess jurisdiction to consider civil RICO claims), but chose not to do so. Other class members have no right to bring them now.

arising out of the same alleged transactions. Even assuming that petitioner is correct, the court below nonetheless correctly rejected petitioner's argument based on the scope of equitable remedies available under RICO. The Fifth Circuit noted that 18 U.S.C. § 1964(a) extends RICO jurisdiction only "to prevent and restrain" violations of RICO and held that "Section 1964(a) establishes that equitable remedies are available only to prevent ongoing and future conduct." Pet. App. 17. Thus, even if equitable relief is *sometimes* available as a private remedy, and disgorgement is among the forms of equitable relief that might be available in some circumstances to a private party, it is not available here. The court below observed that "Richard concedes that the Appellees no longer market the plumbing systems." *Id.* Indeed, DuPont ceased selling Delrin® to other manufacturers for use in polybutylene plumbing in 1989. Thus, in this case, disgorgement cannot serve the purpose of preventing future misconduct.

Contrary to petitioner's assertion that there is a conflict in the circuits on this issue (Pet. 20), the Fifth Circuit's reasoning is fully consistent with that of the Second Circuit in *United States v. Carson*, 52 F.3d 1173, 1181 (2d Cir. 1995), the only other federal appellate decision to have addressed the scope of a possible disgorgement remedy under § 1964(a).[20] The court below noted that "when disgorgement is sought for the purpose of compensating a party for past injuries, the [Second Circuit] held that the plain language of § 1964 bars relief." Pet. App. 17. The Fifth Circuit specifically stated

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[20] The United States District Court for the District of Columbia recently criticized *Carson* in *United States v. Philip Morris USA, Inc.*, 321 F. Supp. 2d 72, 77 (D.D.C. 2004) (citing *Carson*, 52 F.3d at 1182). Nevertheless, the *Philip Morris* court ultimately ruled that the proper inquiry in determining whether disgorgement is available is whether the plaintiff presented "a showing of a reasonable likelihood of future RICO violations." *Id.* at 76. Even under this formulation, there is no reasonable likelihood of continuing RICO violations with respect to a product that has not been manufactured for nearly a decade.

that "[w]e agree with the Second Circuit's reasoning in *Carson*." *Id.*

Referring to *Carson*, petitioner asserts that the court below "twisted the decision it purported to follow" because the defendant in *Carson* was a retired union official and respondents here "are big corporations, perpetual in duration and constantly obtaining new revenue." Pet. 20-22. However, the size and income of respondents is irrelevant to the question of whether disgorgement will halt a continuing series of RICO violations. As in *Carson*, the significant fact here is that the acts petitioner complains of occurred many years ago and petitioner has not alleged any facts showing continuation of the alleged conduct. Indeed, all of the alleged RICO predicate acts described in petitioner's most recent amended complaint occurred between 1978 and 1987. R. 499-501. Equitable relief would not put a halt to continuing misconduct in this case, because there is none. The Fifth Circuit's decision is fully consistent with the language of § 1964(c) and with the only other circuit court to have considered a similar issue.

CONCLUSION

The petition should be denied.

Respectfully submitted,

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August 13, 2004

APPENDIX A

IN THE CIRCUIT COURT OF
GREENE COUNTY, ALABAMA

[Filed Jun. 30, 1995]

Civil Action No. CV-94-074

GARRIA SPENCER, *et al.*,

Plaintiffs,

v.

SHELL OIL COMPANY, *et al.*,

Defendants.

ORDER OF CLASS CERTIFICATION

Plaintiffs have moved for an order pursuant to Rule 23, Alabama Rules of Civil Procedure, that this case may be maintained and certified a class action. On June 19, 1995, the Court heard extensive argument from the parties' counsel and admitted into evidence the parties' evidentiary submissions. The Court finds that there is sufficient proof in the record making it practicable for the Court to rule upon the Plaintiffs' Motion for Class Certification. Ala. R. Civ. P. 23(c)(1). The Court also finds that it has jurisdiction over the subject matter, the parties, and that venue is proper.

The Court is authorized to "make appropriate orders" under Rule 23(d)(1) for the conduct of class actions and to determine the course of the proceedings. The Court also is not bound by the class definition proposed by the Plaintiffs, and may adjust the definition and divide the class into subclasses, if needed. *Ex parte Hayes*, 579 So. 2d 1343, 1345 (Ala. 1991).

For the reasons stated below, the Motion for Class Certification shall be and hereby is GRANTED, and the class defined as follows shall be and hereby is CERTIFIED:

An opt-out plaintiff class as to Defendants, Shell Oil Company d/b/a Shell Chemical Company ("Shell") and Hoechst Celanese Corporation ("Celanese"), who are given notice in accordance with the due process clause of the U.S. Constitution and who are defined as follows:

> All persons and entities who presently own or who come to own before the end of the notice period or who previously have owned any improvements to real property or structures in the United States in which there is or was, during the time of such ownership, a polybutylene plumbing system or the components thereof which in whole or in part was manufactured, designed, supplied and/or contained raw materials sold by Shell and/or Celanese, provided, however, that the following persons and claims are excluded from the class:
>
> —All claims for personal injury;
>
> —Defendants, all manufacturers of polybutylene pipe, fittings, and/or components of polybutylene plumbing systems, and their parents, subsidiaries, affiliates, or controlled entities, and the officers, directors, agents, and employees of each of the foregoing;
>
> —All governmental entities, municipalities, and public or private water supply systems; and
>
> —All persons or entities who, as of May 26, 1995, have filed an individual non-class, polybutylene plumbing system lawsuit against Shell and/or Celanese, or are members of the class certified in the polybutylene plumbing system class action pending in San Diego County, CA, or are individuals represented by and who shall be identified in writing by the Houston, TX law firm of Fleming, Hovenkamp & Grayson, P.C. or the San Antonio, TX law firm of Montgomery & Associates,

P.C., except that these persons or entities may "opt-into" this class action by a filing with the Clerk no later than ten (10) days prior to the start of trial.

All persons or entities who come to own after the end of the class notice period but prior to trial any improvements to real property or structures in the United States in which there is or was, during the time of such ownership, a polybutylene plumbing system or the components thereof which in whole or in part was manufactured, designed, supplied and/or contained raw materials sold by Shell and/or Celanese, may "opt-into" this class action at any time by a letter or other document filed with the Clerk no later than ten (10) days prior to the start of trial.

The Court finds that the above class definition, which is substantially in the form proposed by Plaintiffs, is fair and just. The Court further finds that such a class exists and is reasonably ascertainable in this litigation. The Court notes that, if necessary, this class certification may be modified as the case proceeds, including the establishment of subclasses.

I. Introduction

The named Plaintiffs are adult residents from Greene County, Alabama, Texas, and Illinois who own or previously have owned improvements to real property or structures in the United States in which there is or was during the time of such ownership a polybutylene plumbing system, or the components thereof, which was manufactured, designed, supplied, and/or contained materials sold by Defendants. Plaintiffs bring this cause of action pursuant to common law for damages and other relief. Plaintiffs allege that Defendants have committed torts and engaged in wrongful conduct, including breaches of warranty, in connection with the development, design, manufacture, marketing, sale, and

distribution of polybutylene plumbing systems[1] and their components. Specifically, Plaintiffs allege that Defendants Celanese and Shell are liable at law for damages to the class members for allegedly defective polybutylene plumbing systems.

Plaintiffs have settled their claims on a classwide basis with the other Defendant, E. I. DuPont de Nemours and Company ("DuPont"). The Court has preliminarily approved that Settlement. *See* Order No. 1. In Order No. 1, the Court made preliminary findings that the elements of class certification were present for purposes of the DuPont settlement. The Court, however, in considering the pending Motion for Class Certification, has decided to base its decision only on the arguments and evidence submitted by the parties at the certification hearing, rather than rely on the Court's preliminary findings and conclusions in Order No. 1.

As noted, the Court recognizes that a class certification order "may be conditional, and may be altered or amended before the decision on the merits." Ala. R. Civ. P. 23(c)(1); *First Ala. Bank v. Martin*, 381 So. 2d 32 (Ala. 1980). Resolution of the Plaintiffs' Rule 23 class certification motion is committed to the sound discretion of the Court, and the decision will not be overturned except for abuse of discretion. *Marshall Durbin Co. v. Jasper Util. Bd.*, 437 So. 2d 1014, 1026 (Ala. 1983). Plaintiffs bear the burden of proof of establishing that all requirements of Rule 23 have been met. *Ex parte Blue Cross & Blue Shield of Ala.*, 582 So. 2d 469, 477 (Ala. 1991); *Rowan v. First Bank of Boaz*, 476 So. 2d 44, 47 (Ala. 1985).

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[1] Plaintiffs have defined "polybutylene plumbing systems" as follows: "they refer to and include water supply plumbing containing, among other things, pipes fabricated, in whole or in part, from polybutylene, and fittings, including tees, elbows, and couplings, fabricated in whole or in part, from Celcon and/or Delrin acetal copolymer, whether sold and/or installed as a system or separately."

An inquiry into the merits of Plaintiffs' causes of action is inappropriate when making the class certification decision. *Ex parte Gold Kist, Inc.*, 646 So. 2d 1339, 1343 (Ala. 1994). Indeed, the substantive non-class allegations of the Plaintiffs' complaint are taken as true for purposes of deciding the class certification. *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 163 (1974). The Court, however, must make specific findings of fact as to the elements necessary for class certification, with Plaintiffs bearing the burden of persuasion. The Court notes that the Plaintiffs and Defendants, Shell and Celanese, have submitted substantial evidentiary materials and presented lengthy memoranda and arguments.

The Court finds it significant that in the *Beeman* case both Shell and Celanese agreed to a nationwide class certification in a Texas state court within the context of a settlement class. The only explanation provided to the Court by Shell and Celanese for their agreement to such in *Beeman* and their vigorous opposition to a nationwide class here was that *Beeman* was a settlement class.

This explanation is suspect at best. First, the same arguments made in opposition to certification here would be just as present in the context of a settlement, e.g., alleged unmanageability, atypicality of claims, differences in damages, and so on. Second, a court should determine on its own whether all the class action requirements are met, regardless of the parties' agreement, and should make specific findings. In requesting a settlement class in *Beeman*, Shell and Celanese were in effect asking that court to make the findings they do not want this Court to make. Finally, although invited by Plaintiffs' counsel to respond, neither Shell nor Celanese denied that they were attempting to settle their polybutylene problems on a nationwide class basis elsewhere.

Alabama Rule of Civil Procedure 23(a) sets forth prerequisites to *all* class actions. The requirements of Rule 23(a) are as follows: (1) the class is so numerous that joinder of all

members individually is "impracticable" [Rule 23(a)(1)]; (2) there are questions of law or fact common to the class [Rule 23(a)(2)]; (3) the claims or defenses of the class representative(s) are typical of the claims or defenses of the class [Rule 23(a)(3)]; and (4) the persons representing the class are able fairly and adequately to protect the interests of all members of the class [Rule 23(a)(4)].

After demonstrating that the Rule 23(a) requirements are satisfied and that an ascertainable class exists, Plaintiffs must *also* satisfy one or more of the elements enumerated in Rule 23(b) for maintaining the suit as a class action. *Eisen*, 417 U.S. at 163. The following element is particularly relevant to the present case: whether the questions of law or fact common to the class predominate over questions affecting the individual class members . . . and, on balance, a class action is superior to other methods available for adjudicating the controversy [Rule 23(b)(3)]. The Court will first analyze the Rule 23(a) requirements and later discuss Rule 23(b).

II. Rule 23(a) Requirements

A. Numerosity

The first requirement, numerosity, is satisfied if the proposed class is so numerous that joinder of all members is impracticable. Ala. R. Civ. P. 23(a)(1). "Impracticable" does not mean "impossible"; Plaintiffs need only show that it would be extremely difficult or inconvenient to join all members of the class. *In re Domestic Air Transp. Antitrust Litig.*, 677 F.2d at 698 (citing 3 Newberg, Newberg on Class Actions, § 18.03 at 455 (1985)). When the number of class members is large, as it is here, numerosity alone can establish impracticability and the Court need not look to other factors. *Finnan v. L.F. Rothschild & Co.*, 726 F. Supp. 460, 465 (S.D.N.Y. 1989); *Thillens, Inc., v. Community Currency Exch. Ass'n*, 97 F.R.D. 668, 676-77 (N.D. Ill. 1983). Geographic dispersion of those class members is another signifi-

cant factor in the numerosity determination. *Kilgo v. Bowman Transp., Inc.*, 789 F.2d 859, 878 (11th Cir. 1986); *Alvarado Partners, L.P., v. Mehta*, 130 F.R.D. 673, 675 (D. Colo. 1990); *Patrykus v. Gomilla*, 121 F.R.D. 357, 361 (N.D. Ill. 1988).

The Court finds that any argument against numerosity is without merit. First, the record demonstrates that there are as many as six million housing units containing a polybutylene plumbing system. This number was not rebutted or contested by Defendants at the certification hearing. Moreover, the affected housing units and class members are dispersed throughout several states. Obviously, joinder of all putative class members would be impracticable, and result in serious hardship and inconvenience, and likely be impossible. The Court finds that the number of units coupled with the great geographic dispersion satisfies the numerosity requirement of Rule 23(a).

B. Commonality

The second element of Rule 23, commonality, is satisfied if there are some questions of law or fact common to the class. Fed. R. Civ. R. 23(a)(2). Clearly, there are many common issues among class members. For instance, there are common, if not identical, issues of fact relating to the historical development, chemical composition, design, manufacture, and marketing of polybutylene plumbing systems and their raw materials and components, the content and veracity of Defendants' representations, Defendants' claims history, if and when Defendants had notice of a defect, Defendants' documents, the parties' expert testimony, the testimony of Defendants' employees, and the like. There are also numerous common issues of law, including whether Plaintiffs can meet their burden on the elements of their various causes of action, as well as discovery and evidentiary issues of law. The majority of Shell and Celanese's defenses also present issues of fact and law common to the entire class. Therefore,

the Court finds that Plaintiffs have made the required showing of commonality under Rule 23(a)(2).

C. Typicality

Rule 23(a)(3) requires that Plaintiffs demonstrate that the claims or defenses of the class representatives are typical of the claims or defenses of the class. That is, the named Plaintiffs' claims are typical if they arise from the same event, practice, or course of conduct that forms the basis of the class claims, and if they are based on same or similar legal theories. *Appleyard v. Wallace*, 754 F.2d 955, 958 (11th Cir. 1985).

The Court finds that the class representatives' claims arise from the same course of conduct by Defendants and the same nucleus of operative facts and are based on upon the same legal theories as those of the absent class members they seek to represent. The named Plaintiffs base their claims and the claims of those they seek to represent upon the wrongful and tortious conduct of Defendants as to polybutylene plumbing systems in general, and not as to a singular or specific system in an individual's housing unit. The Court finds that typicality is established because the class representatives must prove the same elements to establish their causes of action that the absent class members would need to prove to establish their causes of action if they brought individual claims against the Defendants. *In re South Central States Bakery Prods. Antitrust Litig.*, 86 F.R.D. 407, 416 (M.D. La. 1980). Accordingly, the typicality requirement for class members is satisfied.

D. Adequate Representation

The final requirement of Rule 23(a) is that the persons and counsel representing the class must be able fairly and adequately to protect the interests of all members of the class. Unquestionably, Plaintiffs are represented by qualified and competent counsel who will vigorously prosecute this action.

The Court is very familiar with the legal capabilities of Mr. Chestnut, Mr. Frazer, Mr. Whatley, Mr. Kuykendall, and Mr. Drake and find that their advocacy in this case and in other cases before this Court is and has been excellent.

Shell and Celanese, however, argue that Mr. Fleming is inadequate due to his representation of thousands of absent class members who are excluded by the class definition, as well as Mr. Fleming's opposition to the *Beeman* settlement class in Houston, Texas. These Defendants also contend that there is a conflict between the claims of Mr. Fleming's individual clients and the class members and that these supposed divergent interests prevent the same counsel from adequately representing the class.

The Court finds that there is no merit to these "inadequacy" arguments. Mr. Fleming and his law firm have an unblemished record of success in polybutylene plumbing litigation. His opposition to the *Beeman* settlement was motivated by his belief that the *Beeman* settlement was a "sweetheart deal" and thus unfair and inadequate for the class. He provided a very credible explanation for excluding his individual clients from the class, and the Court does not see any conflict in that regard, especially since Mr. Fleming represented that he may "opt-in" some or all of these clients through the "opt-in" provision suggested by the Plaintiffs. Additionally, Mr. Fleming's litigation performance in this case has been nothing but professional. The Court is convinced that Mr. Fleming will adequately and vigorously represent the class.

The test for adequacy of class representation focuses on whether the interests of the class representatives conflict with those of the class, and whether the class representatives will competently represent the interests of the class. *Sosna v. Iowa*, 419 U.S. 393, 403 (1975). Shell and Celanese's attempted attack on the merits of the named Plaintiffs' claims is not a subject for consideration at the class certification

stage. *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974). The Court finds that the named class representatives will fairly and adequately represent and protect the interests of all class members, and not put any perceived individual interests above those of the class.

The Court also finds that Celanese's argument, that some of the putative members may not have Celanese's product in their housing units, is without merit. With respect to numerosity, commonality, and typicality, Plaintiffs are not required at this stage to prove that all of the putative members of a class are actual members. *Carpenter v. Davis*, 424 F.2d 257 (5th Cir. 1970). It is noteworthy that the named Plaintiffs may be supplemented or replaced by others at any stage of the litigation. *In re Copley Pharmaceutical, Inc.*, 158 F.R.D. 485, 490 (D. Wyo. 1994).

Defendants also assert that the Plaintiffs are not typical or adequate representatives of absent class members due to differences in their damages. Courts have generally declined to consider conflicts or differences in damages as sufficient to defeat the adequacy requirement. *Blackie v. Barrack*, 524 F.2d 891, 909 (9th Cir. 1975). This is especially true when the class representatives and class members have a common interest in establishing liability against the defendants, as they certainly do here. Any conflict as to damages is merely theoretical at this point and is insufficient to defeat class certification. Accordingly, the Court is satisfied that Plaintiffs have established the adequate representation element of Rule 23(a)(4).

Accordingly, the named Plaintiffs are hereby appointed as class representatives to represent the class. Accordingly, the following attorneys are hereby appointed lead class counsel: J.L. Chestnut, Jr., T. Roe Frazer II, Joseph R. Whatley, Jr., Frederick T. Kuykendall III, George M. Fleming, and R. Jackson Drake.

For the foregoing reasons, the Court finds that Plaintiffs have satisfied each of the four requirements of Rule 23(a).

III. Rule 23(b) Requirements

After establishing that the requirements of Rule 23(a) are satisfied and that an ascertainable class exists, Plaintiffs must also satisfy one or more of the elements enumerated in Rule 23(b).

The Plaintiffs seek certification pursuant to Rule 23(b)(3) which requires that common questions predominate over individual questions and that a class action be the superior method of adjudicating the controversy. The Court finds that the questions of law and fact common to the members of the class predominate over any questions affecting only individual members. The issues affecting individual members pale in comparison to the numerous questions of law and fact common to all class members. That there may be some differences in applicable law and damages can be taken care of through a properly drafted case management order and/or jury charge.

Defendants argue that this class action would be unmanageable because proof of injury will require a multitude of individualized examinations. The Court is not persuaded that this case will require "mini-trials" on the issue of damages. The class action is not unmanageable. Proof of liability in this case can be established through common evidence, and damages can be proven largely using objective data and will not involve thousands of separate "mini trials" involving lengthy individual examinations of numerous class members. Furthermore, as the court held in *In re Asbestos School Litigation*, 104 F.R.D. 422, 432 (E.D. Pa. 1984), *aff'd in part, vac'd in part on other grounds*, 789 F.2d 996 (3d Cir. 1986), "the 'overwhelming weight of authority' holds that the need for individualized damages calculations does not diminish the appropriateness of class certification where com-

mon questions as to liability predominate." Several courts have certified nationwide class actions presenting much more challenging manageability issues than this case. *See, e.g., In re School Asbestos Litig.; supra; Jenkins v. Raymark Industries, Inc.*, 782 F.2d 468 (5th Cir. 1986); *In Re Domestic Air Transp. Antitrust Litig.*, 137 F.R.D. 677 (N.D. Ga. 1991). In *In Re Domestic Air Transp. Antitrust Litig.*, for example, the court certified a class action involving millions of class members and over 400 million transactions. 137 F.R.D. at 693.

Finally, the Court must determine whether the class action is the superior method of dealing with this controversy. If the question is close, courts should err in favor of class certification in order to protect the judicial system from repetitive litigation. There is no real question that a class resolution is much more favorable than individual trials which would be grossly repetitive of the common issues of fact, law, and liability.

The Court finds that if the class is not certified it is possible that many claims will not be pursued because the costs will exceed the possible recovery and because many class members may never know of their potential claims. Accordingly, the Court finds that a class action is a superior method of adjudicating this controversy for many good reasons, including: (1) any interest of class members in individually controlling the prosecution of separate actions is outweighed by the comprehensiveness and speedy resolution of this class action; (2) the number and type of individual lawsuits commenced by members of the class have failed to result in relief to the overwhelming majority of class members, even in spite of the successful nature of that litigation; (3) it is desirable to concentrate the litigation of the claims in one forum; and (4) the Court foresees no peculiar or insurmountable difficulties likely to be encountered in the management of this class action.

The Court further finds that Plaintiffs have satisfied the requirements of Rule 23(b)(l)(A), as there is a risk that separate actions will be brought if a class action is not permitted. Numerous class actions have been filed in other states, and there will likely be more filed as well as numerous individual actions if a class action were not certified in this case. This likely would lead to the Defendants being exposed to inconsistent and varying adjudications, and potential incompatible standards of conduct.

IV. Notice

The Plaintiff's counsel are directed to provide the Court with a proposed notice, proposed notice plan, and proposed notice order as soon as is practicable following the entry of this Order. The notice and notice plan must be consistent with Rule 23, Alabama law, and *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985).

The Court has not been cited to enough authority to justify requiring Shell and Celanese to pay for the notice. The Court thus finds that Plaintiffs and/or Plaintiffs' counsel shall be responsible for paying for the notice and a ensuring that the notice is disseminated in accordance with the notice plan to be approved by the Court. The Court, however, finds that in the interest of resource conservation the notice of this class certification, in Plaintiffs' counsel's discretion, may be included in and incorporated into the notice to be disseminated of the DuPont settlement.

V. Conclusion

For the foregoing reasons, it is ORDERED that Plaintiffs' Motion for Class Certification is GRANTED and the class defined hereinabove is CERTIFIED.

IT IS FURTHER ORDERED that Shell and Celanese's separate motions to strike shall be and hereby are denied.

IT IS FURTHER ORDERED that Shell and Celanese's motions and requests to continue and/or adjourn the certification hearing are DENIED as moot.

IT IS FURTHER ORDERED that Shell's motion to reconsider Order No. 1 preliminarily approving the DuPont settlement shall be and hereby is DENIED.

SO ORDERED, this 30th day of June, 1995.

/s/ Eddie Hardaway, Jr.
EDDIE HARDAWAY, JR.
CIRCUIT COURT JUDGE

APPENDIX B

IN THE CIRCUIT COURT OF
GREENE COUNTY, ALABAMA

[Filed Nov. 17, 1995]

Case No. CV-94-074

GARRIA SPENCER, *et al.*, Individually and on Behalf of all Others Similarly Situated,

Plaintiffs,

v.

SHELL OIL COMPANY d/b/a SHELL CHEMICAL COMPANY; HOECHST CELANESE CORPORATION; E.I. DU PONT DE NEMOURS AND COMPANY,

Defendants.

ORDER FINALLY APPROVING CLASS ACTION SETTLEMENT AGREEMENT AND DISMISSING CLASS ACTION WITH PREJUDICE AGAINST E. I. DU PONT DE NEMOURS AND COMPANY

The motions of class counsel and defendant E. I. du Pont de Nemours and Company ("DuPont") for final approval of class action settlement ("DuPont Settlement") was heard this 17th day of November, 1995.

1. Garria Spencer, et al. instituted this Action by Complaint dated November 16, 1994, individually and on behalf of others similarly situated, against DuPont and other defendants claiming that defendants were liable for alleged defects in polybutylene plumbing systems. On May 4, 1995 plaintiffs and DuPont executed a Settlement Agreement and Stipulation dated June 27, 1995 which provide for settlement of this Action and an order dismissing this Action with prejudice, subject to approval of this Court. On May 12,

1995, class counsel and DuPont filed a joint motion for preliminary approval of the DuPont Settlement. Under the terms of that Settlement, DuPont agreed to reimburse homeowners for eight percent of the cost of replacement of their polybutylene plumbing system and eight percent of unreimbursed property damage. DuPont agreed to pay this amount without regard to whether a class member has yet suffered a leak in their polybutylene plumbing system; regardless of when the plumbing system was installed; and regardless of whether the plumbing system contains any of DuPont's acetal resin, Delrin.

2. After conducting a hearing, on May 25, 1995, the Court issued its Order Granting Preliminary and Conditional Approval of the DuPont Settlement.

3. Thereafter, notice in a form approved by the Court was disseminated to the class. The notice was sent via first class and by means of a massive national media campaign.

4. The Court ordered deadline to opt out of the DuPont Settlement expired on October 27, 1995. The Court ordered deadline to file objections to the DuPont Settlement expired on October 27, 1995.

5. The Court has been informed that, based upon negotiations occurring subsequent to the dissemination of the notice to the class, DuPont has agreed to raise its percentage contribution to the class for replumbs and damages from eight percent to ten percent. No other significant terms of the DuPont Settlement affecting the rights of the class have changed.

NOW THEREFORE, IT IS ORDERED:

6. The Settlement Agreement between Plaintiffs, on behalf of themselves and as representatives of the Settlement Class (as defined in paragraph 8 hereof) , and DuPont dated May 4, 1995, as subsequently modified by stipulation, is fair, ade-

quate and reasonable to the Plaintiffs, the members of the class, and DuPont. The Settlement Agreement is hereby formally approved in all respects and the parties are hereby ordered to consummate and perform its terms.

7. The Court finds that the form of notice satisfies the requirements of Rule 23 of the Alabama Rules of Civil Procedure and the Due Process Clause of the Fourteenth Amendment in that it fairly and accurately described the pending Action and the DuPont Settlement. The notice advised class members of their right to be excluded from the class and that those who do not timely request exclusion would be bound by the judgment. The notice also advised the class members of their right to enter an appearance through counsel and the right to object to the DuPont Settlement. Based upon the affidavit of Wayne L. Pines and those of class counsel, the Court finds that the means of disseminating the notice was the best practicable, reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the Action and their rights therein.

8. All conditions to the DuPont Settlement have been met. The Court, therefore, removes the conditional nature of its certification of the class and hereby enters a binding, final certification of a plaintiff settlement class ("Settlement Class") consisting of the following:

> All persons and entities who own or who previously owned or will own any improvements to real property or structures in the United States in which there is or was during the time of such ownership, a polybutylene plumbing system with plastic insert fittings made of acetal resin ("polybutylene plumbing system").

Excluded from the Class are:

> a. All persons who, in accordance with the terms of the Settlement Agreement and the Notice to the Class, have executed and mailed or submitted a timely request for exclusion from the Class;

b. The defendants, any and all manufacturers of polybutylene pipe, fittings and/or components of any and all polybutylene plumbing systems, the parent and any subsidiary, affiliate, or controlled entity of any of them, and the officers, directors, agents, and employees of each of them; all persons that have only yard lines as opposed to a polybutylene plumbing system;

c. All persons who as of May 12, 1995: (i) have pending an individual non-class lawsuit against DuPont in connection with a polybutylene plumbing system, (ii) are members of a class certified against DuPont in any polybutylene plumbing system class action lawsuit, (iii) are individual claimants represented by the Houston, Texas law firm of Fleming, Hovenkamp & Grayson, P.C.; or (iv) members of the certified class in San Diego County, California;

d. All persons who have previously executed a release in favor of DuPont regarding polybutylene plumbing systems;

e. All persons who had replumbs done before May 12, 1995, unless the homeowners was not fully reimbursed for the cost of such replumb;

f. All governmental entities, municipalities, commercial systems, and persons having yard line systems only; and

g. Any and all claims for personal injury or wrongful death.

9. Upon execution of this Order and by Order of this Court, plaintiffs and each other member of the Settlement Class, on behalf of themselves and their respective parents, subsidiaries, affiliates, related entities, successors and/or assigns, and their past, present, and future agents, representatives, servants, partners, executors, administrators, assigns, predecessors, successors, descendants, dependents, and heirs, shall be deemed to have fully released and forever discharged

DuPont, its parents, subsidiaries, affiliates, retailers, dealers, distributors, along with all of their respective past and present parents, subsidiaries, joint ventures, related entities, affiliates, present and former directors, officers, consultants, agents, stockholders and employees (who individually and collectively shall be referred to as the "Released Parties"), from any and all claims, demands, actions, causes of action, costs losses and suits of every kind and nature whatsoever which the plaintiffs or any member of the Settlement Class may now have or may have had at any time heretofore or may have at any time hereafter, whether known, unknown, foreseen, unforeseen, patent or latent, from the beginning of time to the date hereof, arising from, resulting from, or in any manner relating to any matter relating to polybutylene plumbing systems; and, more particularly, but without in any way limiting the generality of the foregoing, the plaintiff and each member of the Settlement Class will be deemed to have released, remised, and forever discharged the Released Parties of and from any and all claims asserted by the plaintiffs or that could have been asserted by the plaintiffs, and any and all claims related to any claims asserted by the plaintiffs or that could have been asserted by the plaintiffs, in the above-captioned action (collectively the "Released Claims").

10. Upon execution of this Order and by Order of this Court, DuPont, its parents, subsidiaries, affiliates, retailers, dealers, and distributors, along with all of their respective past and present parents, subsidiaries, joint ventures, related entities, affiliates, past and present and former directors, officers, consultants, agents, stockholders and employees (the Released Parties) are forever discharged from any and all claims, demands, actions, causes of action, costs, losses and suits of every kind and nature whatsoever which the plaintiffs or any member of the Settlement Class may now have or may have had at any time heretofore or may have at any time hereafter, whether known, unknown, foreseen, unforeseen, patent or latent, from the beginning of time to the date hereof,

arising from, resulting from, or in any manner relating to any matter relating to polybutylene plumbing systems.

11. Actual Class Members or those who thought they may be class members who have validly and timely requested exclusion may pursue their own individual remedies, if any.

12. The plaintiffs and all other members of the Settlement Class are hereby enjoined and prohibited from commencing or participating in any action, either directly, individually, representatively, or in any capacity, against any Released Party arising from, resulting from or in any manner relating to polybutylene plumbing systems or the subject of the above-captioned Action.

13. All parties and non-parties are hereby enjoined and prohibited from commencing or participating in any action, either directly, individually, representatively, or in any capacity, against any Released Party arising from, resulting from or in any manner relating to polybutylene plumbing systems that are or could have been the subject of the above-captioned Action.

14. No further notice of the DuPont Settlement or the approval thereof is required.

15. The Court reserves jurisdiction, without affecting the finality of this Order, over: (a) implementation of this Settlement Agreement (b) enforcing and administering this Order as against any of the Settling Parties or Settlement Class Members, (c) enforcing and administering the Settlement Agreement, including any releases in connection therewith; and (d) other matters related or ancillary to the foregoing.

IT IS SO ORDERED, this 17th day of November, 1995.

/s/ Eddie Hardaway
EDDIE HARDAWAY
CIRCUIT JUDGE EDDIE HARDAWAY

APPENDIX C

IN THE CHANCERY COURT FOR OBION COUNTY, TENNESSEE AT UNION CITY, TENNESSEE

[Filed Nov. 17, 1995]

Civil Action No. 18,844

CLASS ACTION
OBION COUNTY

TINA COX, CHARLES HOMER CLOAR, MARY H. CLOAR, MELODY ALFORD, COUNTRY VILLAGE MOBILE HOME PARK, and PHYLLIS BIRMINGHAM, individually and on behalf of all other individuals and entities similarly situated,

Plaintiffs,

v.

SHELL OIL COMPANY, d/b/a SHELL CHEMICAL COMPANY, and HOECHST CELANESE CORPORATION,

Defendants.

FINAL JUDGMENT

This matter is before the Court on motion by the parties for final approval of their proposed settlement as set forth in the Settlement Agreement filed July 31, 1995, as amended by an Amendment dated October 6, 1995, a Second Amendment dated October 24, 1995, and a Third Amendment dated November 9, 1995 (the "Agreement"). Also before the Court is the Application of Class Counsel for Award of Attorneys' Fees and Expenses, and Awards to the Representative Plaintiffs (the "Application").

A hearing on the motion and Application was held on November 8 and 9, 1995, pursuant to the Court's Order of July 31, 1995, granting preliminary approval of the settlement

and the August 7, 1995, order conforming the class definition, under procedures set forth in the August 24, 1995, Order Approving Forms of Notice, Scheduling Fairness Hearing and Setting Opt-out and Objection Dates.

This Final Judgment is entered pursuant to a Final Order Approving the Class Action Settlement, Attorneys' Fees and Expenses, and Awards to Representative Plaintiffs (the "Final Order") which is entered together herewith. The Court has determined that the Class Action Settlement, as encompassed within the Agreement, should be approved as fair, adequate, and reasonable to the Settlement Class under Rule 23.05 of the Tennessee Rules of Civil Procedure, and that the Application should be granted.

The Court has further determined that there is no just reason for delay in the entry of final judgment in accordance with the Final Order pursuant to Rule 54.02 of the Tennessee Rules of Civil Procedure.

Accordingly, it is ORDERED that judgment is hereby entered in accordance with the Final Order.

It is further ORDERED that the Settlement Class is defined as follows:

> All persons and entities that (1) own real property or structures in the United States in which there was installed between January 1, 1978 and July 31, 1995, polybutylene plumbing with acetal insert or metal insert fittings or a polybutylene yard service line; (2) own or previously owned such real property or structures and have already incurred any cost or expense, by reason of leakage from, or from failure, repair, or removal of, all or any portion of such polybutylene plumbing or yard service line which was installed between January 1, 1978 and July 31, 1995; or (3) will own such real property or structures during the term of entitlement to relief under the Settlement Agreement.

The definition of the Settlement Class excludes:

> (1) All persons who, in accordance with the terms of the Settlement Agreement, execute a timely request for exclusion from the Settlement Class; (2) the Defendants; the Released Manufacturers; the parent and any subsidiary, affiliate and controlled entity of any of them; and the officers and directors of each of them; and (3) all parties to *Geno Cioe, et at. v. Shell Oil Company, et al.*, Case No. 662214, and *Robert L. Williams, et at. v. Shell Oil Company, et al.*, Case No. 658403, and related combined actions (Case Nos. 640245, 654709, 656787, 661372, 665521 and 665527) in the Superior Court of the State of California in and for the County of San Diego, and all members of the certified classes in those lawsuits.

It is further ORDERED that the Court directs that the settlement be consummated in accordance with the terms and conditions of the Agreement.

It is further ORDERED that the Amended Complaint and all claims and causes of action asserted therein are dismissed with prejudice with costs to be paid from the settlement fund in accordance with the terms of the Settlement Agreement.

It is further ORDERED that, in the event that the settlement does not become final (as more fully defined in the Agreement) in accordance with the terms of the Agreement, then this Final Judgment and the Final Order shall be rendered null and void and be vacated, and the Agreement shall be rendered null and void in accordance with the provisions thereof.

It is further ORDERED that, without affecting the finality of the Final Order and this Final Judgment, the Court shall retain continuing jurisdiction over this action and the settling Parties (as more fully defined in the Agreement), including all members of the Settlement Class; the administration and

enforcement of the settlement; and the benefits to the Settlement Class, including for such purposes as supervising the implementation, enforcement, construction, and interpretation of the Settlement Agreement.

It is further ORDERED that, subject and pursuant to the terms and conditions of the Agreement, Plaintiffs and all members of the Settlement Class are barred and permanently enjoined from prosecuting (in any forum) against Shell Oil Company and/or Hoechst Celanese Corporation any and all claims, demands, causes of action of every kind and nature, obligations, damages, losses, and costs, whether known or unknown, actual or potential, suspected or unsuspected, contingent or fixed, either arising out of or relating to any of the facts, transactions, actions, or conduct alleged in this action, or that were or could have been asserted or sought in the action, other than any past, present, or future claim for bodily injury (including wrongful death) and associated emotional distress and mental anguish.

It is further ORDERED that, in accordance with the above-described Application and the Funding Agreement referred to in the Agreement, the defendants shall pay Plaintiffs' Class Counsel, as attorneys' fees and expenses, the sum of $45 million, plus interest at the rate applicable to federal court judgments entered on July 31, 1995, for the period from July 31, 1995, until the earlier of July 31, 1996, or when paid.

It is further ORDERED that, in accordance with Section 25.1 of the Agreement and with the Funding Agreement referred to in the Agreement, the defendants shall pay the sum of $3,000.00 to each single Representative Plaintiff or Representative Plaintiff married couple.

It is further ORDERED, pursuant to Rule 54.02 of the Tennessee Rules of Civil Procedure, that the Court hereby DIRECTS the entry of this judgment as a final judgment based upon the Court's finding that there is no just reason for

delay, notwithstanding the Court's retention of jurisdiction to oversee implementation and enforcement of the Agreement as set forth above, and the Court's continuing jurisdiction to provide for supplemental notice (and related proceedings) to potential members of the Settlement Class as to whom the Court previously received requests for exclusion from the Settlement Class.

Dated at Union City, Tennessee, this 17th day of November, 1995.

/s/ W. Michael Maloan
W. MICHAEL MALOAN, Chancellor

APPENDIX D

IN THE CHANCERY COURT FOR OBION COUNTY, TENNESSEE AT UNION CITY, TENNESSEE

[Filed Nov. 17, 1995]

Civil Action No. 18,844
CLASS ACTION
OBION COUNTY

TINA COX, CHARLES HOMER CLOAR, MARY H. CLOAR, MELODY ALFORD, COUNTRY VILLAGE MOBILE HOME PARK, and PHYLLIS BIRMINGHAM, individually and on behalf of all other individuals and entities similarly situated,

Plaintiffs,

v.

SHELL OIL COMPANY, d/b/a SHELL CHEMICAL COMPANY, and HOECHST CELANESE CORPORATION,

Defendants.

FINAL ORDER APPROVING THE CLASS ACTION SETTLEMENT, ATTORNEYS' FEES AND EXPENSES, AND AWARDS TO REPRESENTATIVE PLAINTIFFS

This matter is before the Court on motion by the parties[1] for final approval of their proposed settlement (the "Settlement") as set forth in the Settlement Agreement filed July 31, 1995, as amended by an Amendment dated October 6, 1995, a Second Amendment dated October 24, 1995, and a Third Amendment dated November 9, 1995 (the "Agree-

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[1] The parties are the named individual and representative *Cox* plaintiffs, on behalf of the certified Settlement Class, and defendants Shell Oil Company d/b/a Shell Chemical Company and Hoechst Celanese Corporation.

ment"). Also before the Court is the Application of Class Counsel for Award of Attorneys' Fees and Expenses, and Awards to the Representative Plaintiffs (the "Application"). A duly noticed hearing on the motion and Application was held on November 8 and 9, 1995, (the "Fairness Hearing") pursuant to the Court's Order of July 31, 1995, granting preliminary approval of the Settlement and the August 7, 1995, order conforming the-class definition (collectively the "Preliminary Approval Order"), under procedures set forth in the August 24, 1995, Order Approving Forms of Notice, Scheduling Fairness Hearing and Setting Opt-out and Objection Dates.

Notice of the Fairness Hearing was given to potential class members nationwide in accordance with the Preliminary Approval Order and the Court approved notice program. Voluminous pleadings and briefs were submitted by the settling parties in support of the Settlement and in response to all objections and motions filed regarding the Settlement, including the various objections and related papers filed by objector Tony Martin, *et al.*, and affiliated objectors through their attorneys (the "Martin Objectors"). The parties, numerous interested members of the Settlement Class, and others appeared at the Fairness Hearing, either individually or by their respective attorneys. The Court heard and considered evidence in support of the proposed Settlement. This evidence included live testimony, affidavits, documentary and video presentations, as well as oral representations by various attorneys. The attorneys for the parties and others were heard. An opportunity to be heard was given to all other persons requesting to be heard in accordance with the Preliminary Approval Order. This included a significant number of members of the Settlement Class who, in some instances, had traveled great distances from other states to appear and participate in the Fairness Hearing, who were invited to and did make statements and ask questions regarding the terms of the Settlement and the relief it provides.

As more fully set forth below, the Court has determined that the notice given to members of the Settlement Class certified in the Preliminary Approval Order fully and accurately informed the Settlement Class members of all material elements of the proposed Settlement; was the best notice practicable under the circumstances; was valid, due, and sufficient notice to all Settlement Class members; and complied fully with Rule 23 of the Tennessee Rules of Civil Procedure, the United States Constitution, and any other applicable law.

OPINION

The Court has greatly benefited from the fine briefs and oral arguments of the attorneys in this case, all of whom are worthy adversaries, and appreciates the manner in which they have conducted themselves in this most difficult, complex, and hotly contested litigation. Great credit must be given to Judge Richard Silver of Monterey County, California for his initiative to coordinate a settlement conference with the *Cox* and *Spencer*[2] parties. The revised *Cox* Settlement is due, in no small part, to his efforts. The Court also commends Judge Hardaway of Greene County, Alabama, for his willingness to join in this unprecedented effort by three state courts to coordinate and settle competing national class actions. As to the settling parties, the plaintiffs, the plaintiff class, Shell Oil Co., and Hoechst Celanese Corp., the Court acknowledges that if it were not for your recognition of this opportunity to reach a global settlement of these issues, all of these efforts would have been in vain. You have put aside your armor and your hardened positions from years of battle and have finally made peace.

Compromises are favored in the law. Neither this Court, nor any court, has the resources to fully litigate all issues, nor

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[2] *Spencer, et al v. Shell Oil, et al*, Case No. CV 94-074, Circuit Court of Greene County Alabama, Honorable Eddie Hardaway, Jr., presiding.

is it always fair to the parties to do so. The time, cost, and lack of finality of protracted litigation require certain matters to be settled. The polybutylene plumbing litigation's time has come. Closure is not only appropriate, but timely. The parties to this and to the many other individual and group cases that have comprised the polybutylene plumbing litigation have fought long and hard with varying degrees of success and defeat; however, the affected party, the consumer, has seen very little benefit from these efforts. The *Cox* settlement agreement is a compromise. In every compromise, each side must abandon or set aside its ideal position and reach an agreement that is fair and reasonable to all concerned under the circumstances, and not insist on terms only beneficial to one party. The *Cox* settlement is not perfect. I would have preferred that the Agreement include no leak requirements and a larger claims "window" for class members. The Court has some concern the $75 million cap on past damages may not adequately pay all past damages in full; however, these concerns must be weighed in light of the numerous unique advantages to the consumer that the *Cox* settlement does provide.

The Court finds the Settlement is fair, adequate and reasonable. The $950 million dollars is a minimum contribution of the defendants to those who are affected by polybutylene plumbing. When the Court initially gave preliminary approval to the proposed Settlement, this factor was the leading factor in granting that approval. As counsel for the parties have confirmed at various times in open court as the hearings have progressed in this matter, the initial funding commitment (now increased to $950 million) may ultimately be more if funds are expended and provided by the defendants and if other responsible parties contribute to the fund in the future. Due to the uncertainty of the size of the class and how many claims will ultimately be filed, this Court would not have approved a "limited fund" which provided less than full relief while demanding full release. If the worst

case does present itself, that is, if the class is as large as six million people, all claims are presented, and the fund is totally expended; the only prejudice to the consumer will be the delay caused by the filing of claims and payment of funds. The Agreement tolls statutes of limitations for class members. The Agreement provides that any consumers not fully reimbursed or compensated under the terms of the Agreement would be able to pursue all legal and equitable claims and remedies (including punitive damages) individually and as a class.

The Court finds the notice program is excellent. As specified in the findings below, the evidence supports the conclusion that the notice program is one of the most comprehensive class notice campaigns ever undertaken. The Court is satisfied that all reasonable efforts have been made to reach affected consumers.

The Court must also consider the complexity, the expense, and the likely duration of these proceedings if settlement were not reached and approved. The Court must weigh the benefits of settlement against the likely outcome of litigation. As the Court has already stated, much has been spent and much has been done over the past years in group and individual polybutylene pipe litigation across the country, but not much has been accomplished for the benefit of the consumer. The claims in *Cox* and *Spencer* each have their own legal problems, which, if fully litigated, would delay the ultimate resolution of these cases for many years to come. If litigated, complex legal issues would be presented, such as statutes of limitations and repose, choice of appropriate state laws, liability, and measure of damages. All of these issues, if litigated and appealed, could clog the courts across the country for years to come. There is a question as to whether some state courts would give full faith and credit to another state court's determination of these issues.

It is an important aspect of the Settlement that the plaintiffs' attorney's fees and costs are paid by the defendants in addition to the settlement fund, and are not deducted from the settlement fund. In the absence of a comprehensive Class Settlement now, as presented here in *Cox*, after the resolution of the contentious issues described above, any ultimate recovery available for consumers would be reduced by attorney's fees. These normally range from a third to forty percent. None of this delay, risk, mounting transaction costs and reduction of recovery by individual fees would be in the long-term interest of the consumer. In *Cox*, the attorney's fees requested are much less: approximately five percent of the settlement fund; moreover, unlike a typical contingent fee, they are not paid from the fund. The request for fees in the case is approved. The Court finds that they are reasonable under the circumstances, and the Court is pleased to approve them.

The Court is pleased with the reaction of the class members to the proposed Settlement. The Court is greatly comforted by the small number of individual opt-outs, the removal of objections by *Spencer* class counsel and by Tony Martin, who is represented by the Fleming group, and the support expressed by the consumers who testified at the Fairness Hearing. The Court finds that the Consumer Plumbing Recovery Center ("CPRC") claims facility procedures which have been outlined to the Court and which are provided for in the Agreement, appear to constitute a simple, consumer-friendly and efficient method of adjusting the claims in this case.

The discussions and negotiations that ultimately lead to the settlement presented for Court approval were, from all reports and from the Court's own observation, intensive, exhaustive, and often heated. The Court finds the Agreement is the result

of good faith, arms-length, and non-collusive negotiations. The Agreement is fair, adequate, and reasonable under the circumstances, and it is approved.

ADDITIONAL FINDINGS AND CONCLUSIONS

The entire matter of the proposed Settlement and the Application having been fully heard and duly considered by the Court, the Court further FINDS and CONCLUDES, in addition to the findings and conclusions in the foregoing Opinion, as follows:

1. The polybutylene plumbing litigation has been pending, in various forms and in various courts around the country, for more than a decade. It has included individual cases, cases with large numbers of individual plaintiffs, and putative nationwide or statewide class actions brought in federal court and in many state courts.

2. The first nationwide polybutylene plumbing class action was filed in September 1993 by lawyers who are now members of the team of *Cox* Class Counsel. The action, *Robert Beeman, et at. v. Shell Oil Company, et al.*, No. 93-047363, was filed in a state district court in Harris County, Texas.

3. Over the course of many months of intensive negotiations, involving a neutral mediator at many critical junctures, a tentative settlement of the *Beeman* case was achieved in October 1994. In February 1995, however, the Texas state court denied preliminary approval of that settlement without comment.

4. After the Court in this case certified the nationwide class on June 13, 1995, *Cox* Class Counsel joined with the plaintiffs' attorneys in the *Beeman* action to prosecute this case for the benefit of mobile and site-built homes with polybutylene plumbing across the country.

5. Collectively, this combined team of Class Counsel included highly qualified and well-regarded lawyers with extensive class action and complex litigation experience, as well as lawyers with vast experience in polybutylene plumbing litigation.

6. Class Counsel then were able to negotiate a settlement generally patterned after that originally arrived in *Beeman*, although the minimum funding commitment was $100 million greater, other features were added; and only two of the three *Beeman* defendants, Shell and Celanese, were involved.

7. Because of the pendency of a nationwide class action in Greene County, Alabama, and of other polybutylene actions around the country, with many brought as class actions, including an uncertified case for a putative statewide mobile homeowner class in the Superior Court of Monterey County, California,[3] Judge Hardaway and this Court agreed that Judge Silver in Monterey would further the cause of final resolution of polybutylene plumbing litigation if he was appointed to serve as a settlement judge for all three courts.

8. Judge Silver issued an October 12, 1995 *Order Setting Settlement Conference* with the endorsement of this Court and Judge Hardaway, to convene the coordinated settlement process. Other state courts with proposed class actions were asked, by the partries and/or by Judge Silver, to dismiss or stay their proceedings in deference to the coordinated settlement effort in order to give it an opportunity to succeed, undistracted by collateral litigation.

9. Accordingly, from October 23, 1995, through November 7, 1995, the day before the Fairness Hearing in this Court, intensive and continuous global settlement negotia-

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[3] *Meers, et at vs. Shell Oil, et al*, Case No. M 30590, Superior Court of the State of California, County of Monterey, Honorable Richard M. Silver, presiding.

tions were conducted among *Cox* Class Counsel, the *Spencer* counsel, and defendants' counsel and representatives through the mediation and supervision of Judge Silver.

10. As a result of these concentrated efforts, a comprehensive settlement was reached, resulting in significant enhancements to the Settlement as it was originally presented to the Court and preliminarily approved on July 31, 1995.

11. The resulting Settlement, documented and as presented for final approval at the Fairness Hearing, provides consumers with a recovery program consisting of reimbursement of otherwise unreimbursed expenses for repairs to and replacement of leaking polybutylene plumbing systems and property damage caused by such leaks, as well as an extensive program for replacement of such leaking plumbing systems.

12. Some of the features of this Settlement are these:

a. Free replacement of polybutylene plumbing systems installed since January 1, 1978, if two or more qualifying leaks occurred before August 21, 1995, or if only one such leak occurs either in the two years following that date or during a period (of from 10 to 16 years, depending on the type of structure) following installation of the system;

b. Reimbursement of the unreimbursed expenses of plumbing repairs, replacements, and property damage from January 1, 1978, to August 21, 1995, up to $75 million will be distributed, *pro rata* if necessary, for these expenses; and property damage after August 21, 1995, at 100 cents on the dollar;

c. An unlimited funding potential, with the defendants committed to to initially provide up to $950 million for the relief; if additional funds are required, the defendants will either provide them, or litigation will be resumed with all applicable statutes of limitations and repose tolled in the interim;

d. Provision for additional relief to eligible members of the Settlement Class who experience special needs in connection with qualifying leaks;

e. A comprehensive notice program, including notice every three years through the life of the program, which ends in 2009; and

f. The payment of class counsel's attorneys' fees and expenses in addition to the $950 million reserved for relief for the Settlement Class.

13. The Court is not aware of any other class action settlement with successive notices as provided in the *Cox* Settlement.

14. In reaching this Settlement, the defendants have foregone very significant defenses and issues which could have precluded or limited liability as to some or many class members' claims. These include the statutes of limitations and repose, selection of the appropriate states' laws applicable to various issues, the "economic loss" limitation on recoveries of the type sought here, the lack of privity between the members of the Settlement Class and the defendants, the fact that many of the members of the Settlement Class purchased their structures "as is," and, of course, the risk that plaintiffs would not be successful in proving their allegations. In agreeing to this Settlement, the defendants have displayed commendable corporate responsibility, responsiveness, and good will toward consumers.

15. The Court appointed Rust Consulting, Inc. and Kinsella Communications Ltd. as class notice providers in this case. Richard Redfern, president of Rust Consulting, and Katherine Kinsella, president of the communications firm bearing her name, testified at the Fairness Hearing. The Court also considered Ms. Kinsella's affidavit and the affidavit of Jeffrey Dahl, Executive Vice President of Rust Consulting, in connection with their activities as notice providers.

16. *Cox* Class Counsel and the notice providers worked with Todd B. Hilsee, an experienced class action notice consultant, to design a class notice program of unprecedented reach, scope, and effectiveness. Mr. Hilsee was accepted by the Court as a qualified class notice expert at an earlier hearing to approve the commencement of the notice program. He testified at the Fairness Hearing, and his affidavit was also considered by the Court, as to the operation and outcome of this program.

17. The above-mentioned individuals provided documents, information, and affidavits at the outset of the notice period that assisted the parties in designing, and the court preliminarily approving for implementation, a singularly comprehensive and creative notice program.

18. Beginning in August, 1995, and extending into October, 1995, an extensive notice effort was undertaken in this case to implement the Court approved notice program specified in the Preliminary Approval Order.

19. Since not all Settlement Class members were known or readily identifiable, the notice program implemented in this case combined multimedia publication (newspapers, magazines, radio and television), individual mailed notice, ongoing press and media outreach, and a toll-free telephone information service. The purpose of the program was to make potential Settlement Class members aware of the Action and the Settlement, and to encourage them to identify themselves to the notice providers, so they could receive further written notices and information, and be placed on the notice providers' Settlement Class member database.

20. Commencing on or before August 21, 1995, which is the Initial Notice Date as specified in the Agreement, more than 5.6 million copies of the Court approved Notice of Class Action and Proposed Settlement were mailed, by first class mail or overnight service, to Settlement Class members in accordance with the Preliminary Approval Order.

21. During September, 1995, the Court approved summary notice was published in *Parade* Magazine, *USA Weekend*, *People* Magazine, and *TV Guide* in accordance with the Preliminary Approval Order. The combined circulation of these consumer publications and national magazines is over 73 million. During August and September, 1995, Court approved notice appeared twice in Friday editions of *USA Today*, with combined circulation of over 4.7 million.

22. Also during September, 1995, the Court approved summary notice appeared in 201 daily and weekly newspapers in 13 targeted states (Alabama, Arizona, California, Colorado, Florida, Georgia, Louisiana, Maryland, Nevada, North Carolina, South Carolina, Texas, and Virginia) and the District of Columbia. The combined circulation of these newspapers exceeds 23.6 million. In addition, the notice appeared in Spanish in 38 Hispanic newspapers, with a combined circulation over 3 million, in 29 media markets during September, 1995. Moreover, the notice appeared in 247 daily, weekly, bi-monthly, and monthly African-American newspapers with a combined circulation of nearly 6 million.

23. Notices were also published in the October, 1995, editions of various trade publications, comprising a total circulation of 244,000.

24. A 30-second spot television notice was produced and appeared 213 times from August 21, 1995, through September 3, 1995, on national and cable television, including on such networks as ABC, NBC, CBS, TNN, CNN, and TNT. During the same period, a 30-second Spanish language television notice appeared 18 times on the Univision Network, a popular Spanish language network.

25. A press release, a media advisory, a public service announcement, a video news release, a radio news release, and a press kit were all prepared and disseminated as part of the notice program in this case. The press release went to 2,000 newspapers, wire services, magazines, and broadcast

points across the United States through PR Newswire. The press release and media advisory were also disseminated to 46[illegible]edia outlets, specifically targeting consumer reporters and media in the top 250 media markets and 84 local daily newspapers in the 13 targeted states and the District of Columbia. 142 outlets, with a combined circulation of more than 14.5 million, have confirmed using the press materials to publish articles. It is estimated that the public service announcement was broadcast by radio stations yielding nearly 2.9 million gross impressions; an additional 5.5 million impressions are estimated from the broadcast of the radio news release. The video news release was used by at least 21 outlets with combined viewership of more than 1.7 million. Finally, a two-column article was provided to 10,000 daily and weekly newspapers.

26. Court approved notice forms were disseminated through various online computer services, including CompuServe, Prodigy, and America Online, and with Legal Link on the Internet.

27. The various forms of published notice provided recipients with a toll free "800" telephone number to which potential Settlement Class members could call to obtain further information and to request the full notice packet to be mailed to them. The telephone message was updated as the notice program progressed, and commonly raised questions were answered by live operators, in English or Spanish as required by the caller. The parties prepared and updated scripts and information by which the operators were able to provide the general information commonly requested by callers.

28. The toll-free telephone facility established for notice purposes in this case received more than one million telephone calls in response to the published notice program.

29. Over 195,000 requests for a claim form have been received by the notice providers.

30. Mr. Hilsee demonstrated, by affidavit and in live testimony at the Fairness Hearing, a number of significant facts regarding the reach and effectiveness of the notice. The national media campaign reached an extraordinarily high percentage of United States adults aged 35 years and over: approximately 114 million individuals, or 92.11% of this population. Each of these adults was exposed to the national media notice an average of 4.01 times. The national media campaign also reached approximately 151 million persons in the United States aged 25 years and over, representing 90.88% of this population. Each of the individuals in this larger, secondary target group was reached an average of 3.76 times by the national media notice, a frequency that also exceed the primary target reach in other class actions. These are higher reach and frequency statistics than have been found adequate by courts in other class actions. These data do not include the reach of the notice campaign through means other than the national paid notice campaign, such as the television and print notices targeted to Hispanic and African-American media, the local newspaper notices, the non-paid media and direct mail notices to millions of Settlement Class members.

31. Multifaceted notice programs like that implemented in this case have been approved by other courts and utilized successfully for similar purposes in large consumer or product class actions such as this one, where most class members are not individually identified at the outset. *See, e.g., In re Domestic Air Transportation Antitrust Litigation*, 141 F.R.D. 534 (E.D. Pa. 1992); 148 F.R.D. 297 (E.D. Pa. 1992); *In re Silicone Gel Breast Implant Products Liability Litigation*, MDL 926 (N. D. Ala. 1994); *Roberts v. Bausch & Lomb, Inc.*, 94-C-1144-W (N.D. Ala. 1995).

32. As other courts have done with respect to the less comprehensive notice programs they approved, this Court finds that the notice program described above, as designed

and implemented, met and exceeded the requirements of the United States Supreme Court, Tennessee's Rule 23, due process and the Constitution, as construed in *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985) and its progeny.

33. Thus, the best notice practicable under the circumstances has been provided to members of the Settlement Class. That notice accurately and adequately advised them of this action; the proposed Settlement and its terms, features, and benefits; their rights and options; and the applicable procedures and deadlines for exercising them.

34. A full opportunity has been provided to the members of the Settlement Class to participate in the Fairness Hearing, both orally and by way of written submission to the Court.

35. The Court previously found the requirements of Rule 23 of the Tennessee Rules of Civil Procedure were met and certified a nationwide class for litigation and trial purposes in the Order of National Class Certification. While such certification was and is contested by the defendants, they have agreed to class certification for settlement purposes, to promote a comprehensive, classwide resolution of polybutylene pipe litigation.

36. The numerosity, typicality, commonality, and adequacy requirements of Rule 23.01 of the Tennessee Rules of Civil Procedure are satisfied as to the Settlement Class in connection with the Settlement in this case.

37. In accordance with Rule 23.02(3), common issues of fact and law predominate and make certification of the Settlement Class for settlement purposes efficient and appropriate. The members of the Settlement Class have been afforded the right and opportunity to exclude themselves from the Settlement Class.

38. The settlement encompassed within the Agreement is in all respects fair, reasonable, and adequate and in the best interests of the Settlement Class.

39. The Court-approved notice program provided clear and simple procedures and instructions for the submission of objections by or on behalf of Settlement Class members. For example, paragraph 10 of the Court-approved *Notice of Class Action and Proposed Settlement* required objections to be submitted, in writing, postmarked not later than October 20, 1995, and further stated, "if you do not comply with the procedure and the deadline stated herein, you may not be entitled to be heard at the Fairness Hearing or to otherwise contest the approval of the Settlement, or to appeal from any orders or judgments of the Court entered thereon." All objections, however styled, that failed to comply with the procedures and deadlines set forth in the notice program, are hereby found to be procedurally deficient and are disqualified in accordance with the foregoing statement.

40. The Court has also reviewed the Principles of Agreement dated November 7, 1995, executed by the parties, including the terms applicable to U.S. Brass Corp., Eljer Manufacturing, Inc., and Eljer Industries, Inc. The terms of the Principles of Agreement appear to be reasonable and in accordance with the efforts being made to seek a global resolution of all litigation pertaining to the issues among the parties. The prior *Cox* settlement was unclear as to the effect of funds received from U.S. Brass Corp., Eljer Manufacturing, Inc., and Eljer Industries, Inc. The revised settlement makes clear that amounts received from U.S. Brass and/or Eljers will add to the minimum fund of $950 million. If that settlement is perfected and approved by the United States Bankruptcy Court, the minimum fund would substantially increase.

41. In independently determining to approve the Settlement and the Application, the Court has considered the substance of all objections to the Settlement, whether timely, qualified or not, including those by the Martin Objectors and others that have since been withdrawn or stricken.

42. Certain objectors have asserted that the proposed Settlement must be reduced by a proposed settlement of claims against du Pont in the *Spencer* case pending in the Circuit Court of Greene County, Alabama, which the objectors characterized as a $120 million settlement.

43. The proposed du Pont settlement has not been approved by the *Spencer* court, and this Court may not speculate whether it will be approved by the *Spencer* court.

44. The proposed du Pont settlement in *Spencer* purports to entitle a claimant to a rebate of 8% of monies the claimant pays for replumbing his or her structure.

45. The Settlement before this Court, in the minimum amount of $950 million, provides for the assignment of Settlement Class members' claims against du Pont and others to defendants Shell and Celanese.

46. Objectors are incorrect in asserting that the "credit" arising from the assignment reduces the Defendants' contribution to the Settlement. The original *Cox* settlement was $850 million to be paid by the Defendants. The revised *Cox* settlement requires the Defendants to pay a minimum of $950 million to consumers with assignment of rights, against du Pont, regardless of whether du Pont ultimately participates in the settlement. The revised *Cox* settlement substantially increases benefits to consumers.

47. Contrary to objectors' assertions, all interest earned on funds held by the CPRC will be for the benefit of the Settlement Class and will not be credited against the Defendants' obligations under the Agreement.

48. Because of the structure of the Settlement, the Defendants' obligation to fund the CPRC on an ongoing, as-needed basis, and the Defendants' obligation to pay reimbursement for Past Expenses in a reasonable time after the close of the one year claim filing period on August 21, 1996, and any related opt out period that may be necessary under § 4.5.1 of the Agreement, there is no significant ability by the Defendants to delay payments due under the Settlement.

49. Objectors are incorrect in asserting that, even before the Defendants' initial funding commitment was increased from $850 million to $950 million, the "net funding by Shell and Celanese under . . . the agreement [was] only $547 million."

50. The notice provided to the Settlement Class was neither misleading nor defective.

51. The defendants are each responsible for one-half of the settlement obligations as specified in the Settlement Agreement unless and until the respective liabilities are established by arbitration under the Funding Agreement.

52. The *Cox* Class Counsel have undertaken a reasonable risk that each of the defendant companies will be solvent and capable of fulfilling its obligations under this agreement.

53. Had the plaintiffs settled at separate times with Shell and Celanese, it is highly unlikely that there would ever have been joint and several liability between them.

54. The Settlement is more favorable to the Settlement Class than litigation if it is assumed that one of the defendants will, some years from now, become unable to pay all claims, since the class will receive payment under the Settlement promptly, thereby reducing the number of claimants who would be subjected to proving claims in a bankruptcy.

55. The Agreement provides broad ranging powers for the enforcement of a defaulting defendant's obligations, including the full panoply of equitable powers this Court possesses.

56. The Agreement expressly provides that the default of one defendant does not exonerate the other defendant of its obligations under the Agreement.

57. Past expenses will be compensated after expiration of one year from August 21, 1995, the Initial Notice Date under the Agreement.

58. Claimants will not, contrary to an objection, be required to wait 14 years to receive their entitled reimbursements or distributions under the Agreement.

59. The so-called exclusion of a "hot water heater leak"—a leak occurring within six feet of piping measured from the take-off at the unit's hot water heater—does not apply to any claim for reimbursement of repair costs and property damage. Thus, the only exclusion is for eligibility for a replumb, and even there, the exclusion applies only if (1) it is the first leak in the unit *and* (2) it can be repaired without cutting into the unit's walls, ceilings, or floors.

60. Therefore, a replumb will be provided under the Agreement even if the hot water heater leak is the first leak, if to repair the leak would require cutting into the walls, ceilings, or floors of the unit. Similarly, there will be a replumb if the hot water heater leak is the second leak in the system.

61. The claimant has the right to select the contractor to do the replumbing and property damage repair work.

62. Nothing in the Agreement abrogates the warranty of work done by the contractors and suppliers of pipe and other components in the replumb.

63. The Agreement permits special relief involving unusual hardship, so long as the CPRC Ombudsman and President concur that such relief should be provided. This provision allows the CPRC to provide relief from a breach of warranty arising out of replumbing work, where the warrantor fails to provide or cannot provide corrective relief. CPRC § VI, E.

64. There is no factual basis for the asserted objection that there is any conflict of interest with respect to the *Cox* Class Counsel.

65. The *Cox* Class Counsel maintained the highest standards of professionalism and advocacy in protecting and promoting the interests of the Class throughout the prosecution and settlement of this case.

66. There is no factual basis for the asserted objection that settlements in individual cases are improperly disparate from the *Cox* Settlement.

67. There is no need to provide additional notice to the entire Settlement Class by reason of the revised terms of the Settlement since the Court approved the notices disseminated to the Settlement Class. All changes have been to improve the Settlement over that described in the notices, and none of the changes has an adverse impact on any Class member.

68. As class action jurisprudence has accumulated, various federal and state courts, in Tennessee and elsewhere, have articulated criteria and factors that courts may consider in evaluating proposed settlements for final approval. *See, e.g., Third Nat'l Bank v. Scribner*, 212 Tenn. 400, 410, 370 S. W.2d 482 (1963); *Clark Equip. Co. v. International Union, Allied Indus. Workers*, 803 F.2d 878, 880 (6th Cir. 1986), *cert. denied sub nom. Jones v. Clark Equip. Co.*, 480 U.S. 934 (1987); *Williams v. Vukovich*, 720 F.2d 909, 922 (6th Cir. 1983); *Bailey v. Great Lakes Canning, Inc.*, 908 F.2d 38, 42 (6th Cir. 1990); *In re Warner Communications Sec. Litig.*,

618 F. Supp. 735 (S.D.N.Y. 1985) *aff'd*, 798 F.2d 35 (2d Cir. 1986); *Girsh v. Jepson*, 521 F.2d 153, 157 (3d Cir. 1975). This Court has been guided, generally, by the procedures and criteria recommended in the *Manual for Complex Litigation*, 3d ed. (Federal Judicial Center 1995), §§ 30.4, *et seq.*, since the federal and Tennessee class action provisions and criteria are consistent.

69. Factors that may be considered in assessing the fairness, adequacy, and reasonableness of the proposed settlement include: the plaintiffs' likelihood of ultimate success on the merits balanced against the amount and form of relief offered in the settlement; the stage of the proceedings at which the settlement is reached; the extent of cumulative discovery or investigation; the nature of the settlement negotiations; the costs, risks, and delays of establishing liability and damages; the views of experienced counsel; the reaction of the class members themselves; the comparison of the settlement's benefits with other settlements or with the alternative of continuing litigation; and whether approval of the settlement is in the class members' and the public interest. As the above opinion and findings demonstrate, consideration of these and other recognized factors, such as the participation and recommendations of an experienced and able settlement judge and the testing of the settlement's merits in the clash of adversary proceedings, demonstrate the Settlement's entitlement to approval.

70. Expert opinions have been submitted in support of the proposed Settlement. (*See* Opinion of Professor David Rosenberg, Affidavit of Professor Paul H. Rubin). In approving the Settlement, the Court has considered these opinions.

71. The Court will retain jurisdiction and address a supplemental notice program, on a joint motion of the settling parties, to advise all members of the Settlement Class on whose behalf a purported or actual request for exclusion was received of the enhanced Settlement, providing those indi-

viduals with a new opportunity to request exclusion from the Settlement Class in light of the enhanced Settlement.

72. There is no just reason for delay in the entry of a final judgment and decree by reason of such supplemental notice and related proceedings or of the retention by the Court of continuing jurisdiction to oversee the implementation and enforcement of the Agreement and Settlement.

73. The Application is fair and should be granted.

Based upon the foregoing, it is hereby ORDERED, ADJUDGED, and DECREED:

1. The Court has jurisdiction over all claims asserted in the Action on behalf of all Settlement Class members and over all parties to the Action, including all members of the Settlement Class.

2. The Settlement Class is defined as follows:

> All persons and entities that (1) own real property or structures in the United States in which there was installed between January 1, 1978 and July 31, 1995, polybutylene plumbing with acetal insert or metal insert fittings or a polybutylene yard service line; (2) own or previously owned such real property or structures and have already incurred any cost or expense, by reason of leakage from, or from failure, repair, or removal of, all or any portion of such polybutylene plumbing or yard service line which was installed between January 1, 1978 and July 31, 1995; or (3) will own such real property or structures during the term of entitlement to relief under the Settlement Agreement.
>
> The definition of the Settlement Class excludes:
>
> (1) All persons who, in accordance with the terms of the Settlement Agreement, execute a timely request for exclusion from the Settlement Class; (2) the Defendants; the Released Manufacturers; the parent and any

subsidiary, affiliate and controlled entity of any of them; and the officers and directors of each of them; and (3) all parties to *Geno Cioe, et al. v. Shell Oil Company, et al.*, Case No. 662214, and *Robert L. Williams, et al. v. Shell Oil Company, et al.*, Case No. 658403, and related combined actions (Case Nos. 640245, 654709, 656787, 661372, 665521 and 665527) in the Superior Court of the State of California in and for the County of San Diego, and all members of the certified classes in those lawsuits.

3. All members of the Settlement Class who have not timely elected to be excluded from the Settlement Class are members thereof and are bound by this Order and the Final Judgment being entered herewith.

4. Pursuant to Rule 23.01., Rule 23.02, and Rule 23.03 of the Tennessee Rules of Civil Procedure, the Court confirms the certification of the Settlement Class provided in the Preliminary Approval Order and maintains such certification for purposes of final approval of the settlement.

5. The Class Representatives and Plaintiffs' Class Counsel designated in paragraph 8 of the Court-approved *Notice of Class Action and Proposed Settlement* to represent the Settlement Class are hereby confirmed.

6. The Agreement and the Funding Agreement entered into by the Defendants pursuant to the Agreement are hereby made part of the record in this case and as such shall have the full force and effect of an order of the Court.

7. Pursuant to Rule 23.05 of the Tennessee Rules of Civil Procedure, the Court hereby grants final approval of the Agreement and the Settlement set forth in the Agreement and finds that it is fair, adequate, and reasonable to the members of the Settlement Class.

8. The objections that were filed, whether timely or not, have been considered and are all overruled.

9. Accordingly, the Court directs that the Settlement be consummated in accordance with the terms and conditions of the Agreement.

10. Plaintiffs and all members of the Settlement Class are barred and permanently enjoined from prosecuting (in any forum) against Shell Oil Company and/or Hoechst Celanese Corporation any and all claims, demands, causes of action of every kind and nature, obligations, damages, losses, and costs, whether known or unknown, actual or potential, suspected or unsuspected, contingent or fixed, either arising out of or relating to any of the facts, transactions, actions, or conduct alleged in this action, or that were or could have been asserted or sought in the action, other than any past, present, or future claim for bodily injury (including wrongful death) and associated emotional distress and mental anguish.

11. The Complaint as amended, and all claims and causes of action asserted therein are dismissed with prejudice and costs, as provided in the Agreement, to be paid from the settlement fund.

12. The Application is hereby granted. In accordance with the Funding Agreement referred to in the Agreement, the defendants shall pay Plaintiffs' Class Counsel, as attorneys' fees and expenses, the sum of $45 million plus interest at the rate applicable to federal court judgments entered on July 31, 1995, for the period from July 31, 1995, until the earlier of July 31, 1996, or when paid. In addition, in accordance with Section 25.1 of the Agreement and with the Funding Agreement referred to in the Agreement, the defendants shall pay the sum of $3,000.00 to each single Representative Plaintiff or Representative Plaintiff married couple.

13. In the event that the Settlement does not become Final (as more fully defined in the Agreement) in accordance with the terms of the Agreement, then this Order and the Final Judgment and Decree being entered herewith shall be rendered null and void and be vacated and the Agreement

shall be rendered null and void in accordance with the provisions thereof.

14. Without affecting the finality of this Order or of the Final Judgment being entered herewith, the Court shall retain continuing jurisdiction over the Action and the settling Parties (as more fully defined in the Agreement), including all members of the Settlement Class; the administration and enforcement of the Settlement; and the benefits to the Settlement Class, including for such purposes as supervising the implementation, enforcement, construction, and interpretation of the Agreement.

15. Any disputes or controversies arising with respect to the interpretation, enforcement, or implementation of the Agreement shall be presented by motion to the Court.

16. Pursuant to Rule 54.02 of the Tennessee Rules of Civil Procedure, the Court hereby directs the entry of this judgment based upon the Court's finding that there is no just reason for delay notwithstanding the Court's retention of jurisdiction to oversee implementation and enforcement of the Agreement and its continuing jurisdiction to provide for supplemental notice (and related proceedings) to potential members of the Settlement Class as to whom the Court previously received requests for exclusion from the Settlement Class.

/s/ W. Michael Malone
W. MICHAEL MALONE
Chancellor

Entered: November 17, 1995

No. 03-1543

IN THE

Supreme Court of the United States

RICHARD R. RICHARD, JR.,

Petitioner,

v.

HOECHST CELANESE CHEMICAL GROUP, INC., *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENTS HOECHST CELANESE CORPORATION AND HOECHST CELANESE CHEMICAL GROUP, INC.

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QUESTIONS PRESENTED

1. Did the Fifth Circuit correctly affirm the dismissal of Petitioner's due process claim for lack of federal subject matter jurisdiction under the *Rooker/Feldman* doctrine where the proposed relief would have required a federal court to find that a final Tennessee state court judgment was entered erroneously.

2. Has Petitioner properly pled a due process claim where Petitioner has ignored the settled well-pleaded complaint rule, and asserted a potential response to an anticipatory defense as the basis for federal jurisdiction.

3. Did the Fifth Circuit correctly affirm the dismissal of Petitioner's due process claim where Petitioner alleged no joint activity between Respondents (private citizens) and any state actor.

4. Did the Fifth Circuit correctly affirm the dismissal of Petitioner's civil RICO claims, given that disgorgement is an equitable remedy available only to restrain ongoing or future violations of civil RICO, and here the alleged wrongful conduct ceased long ago.

5. Has Petitioner properly pled civil RICO claims where he was unable to allege "proximate cause" under 18 U.S.C. § 1964, given that he admits he cannot plead detrimental reliance on any alleged predicate acts of mail and wire fraud, and where his alleged injuries are indirect and subject to numerous intervening causal factors.

6. Has Petitioner properly pled civil RICO claims, given that private plaintiffs may not seek equitable relief under 18 U.S.C. § 1964.

STATEMENT PURSUANT TO RULE 29.6

Respondent CNA Holdings, Inc., formerly known as Hoechst Celanese Corporation, is an indirect, wholly-owned subsidiary of Celanese AG. Celanese AG is a publicly traded company in the process of an acquisition by Blackstone Capital Partners. Respondent Celanese Ltd., formerly known as Hoechst Celanese Chemical Group, Inc., is an indirect, wholly owned subsidiary of Celanese Holdings, Inc. Celanese Holdings, Inc. (which is a wholly owned subsidiary of CNA Holdings, Inc.) is not a publicly traded company. (Hereinafter, Hoechst Celanese Corporation and Hoechst Celanese Chemical Group, Inc. shall be referred to collectively as "Celanese.")

EXPLANATION OF RECORD CITES

"Petition" refers to the Petition for Writ of Certiorari.

"Petition App. __" refers to the Appendix attached to the Petition for Writ of Certiorari.

"Celanese App. __" refers to the Appendix attached to Celanese's Brief In Opposition.

"R. __" refers to the Record on Appeal filed with the United States Court of Appeals for the Fifth Circuit.

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Religious Tech. Center v. Wollersheim, 796 F.2d 1076 (9th Cir. 1986), *cert. denied*, 479 U.S. 1103 (1987) 3, 27, 28

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United States v. Rashwan, 328 F.3d 160 (4th Cir.), *cert. denied*, 124 S. Ct. 320 (2003) 20

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COUNTERSTATEMENT OF THE CASE

By this case, Petitioner seeks to ignore the settled *Rooker/Feldman* doctrine, claiming instead that a federal court may review a Tennessee state court's final judgment approving a nationwide polybutylene (*i.e.*, plastic) plumbing class action settlement agreed to by Celanese, Respondent Shell Oil Company ("Shell") and the plaintiff class in *Cox v. Shell Oil Co.*, No. 18,844 (Chancery Court, Obion County, Tenn. Nov. 17, 1995) ("*Cox*"). Petitioner also seeks to federalize state products liability law under the guise of civil RICO, claiming that end users of products who never heard or detrimentally relied upon any alleged misrepresentations by defendants — remote, raw material suppliers — may nevertheless bring federal racketeering claims against and seek disgorgement from these suppliers. As shown below, the lower courts held that Petitioner's claims were barred under well-settled authority. *Richard v. Hoechst Celanese Chem. Group, Inc.*, 355 F.3d 345 (5th Cir. 2003) (Petition App. at 1-20); *Richard v. Hoechst Celanese Chem. Group, Inc.*, 208 F.R.D. 575 (E.D. Tex. 2002) (Petition App. at 21-53). These rulings are fully consistent with prior decisions of this Court and every United States court of appeal to have recently addressed the same matters, and Petitioner offers nothing to justify further review of these rulings.

The Fifth Circuit's Ruling On Petitioner's Due Process Claim

First, the Fifth Circuit ruled that the relief requested by Petitioner — an injunction barring Celanese and Shell from ever asserting the preclusive effect of the *Cox* final judgment — would have required a federal court to review and find erroneous the *Cox* final state court judgment in direct contravention of the settled *Rooker/Feldman* doctrine. This ruling, which affirmed the decision of the United States District Court for the Eastern District of Texas (the "District Court"), is entirely consistent with prior decisions of this Court and every United States court of appeal to have recently addressed the same matter.

Second, the Fifth Circuit ruled that even if Petitioner's due process claim was not barred by the *Rooker/Feldman* doctrine, Petitioner failed to state a violation because Petitioner alleged no joint activity between Respondents (private citizens) and any state actor. Under settled authority of this Court, a due process claim requires action under "color of state law." Here, Petitioner's failure to allege any joint activity with a state actor is unsurprising, given that, among other things, he admits the *Cox* court — the only conceivable state actor here — was an "innocent" actor which had no knowledge of any alleged wrongful conduct. This ruling too is fully consistent with prior rulings of this Court and every other circuit court to have addressed the issue.

Third, Petitioner's due process claim violates the well-pleaded complaint rule. As this Court has long held, federal subject matter jurisdiction is based only upon the allegations of the plaintiff's well-pleaded complaint. However, Petitioner's due process claim is nothing more than an anticipated response to a potential affirmative defense, and thus does not provide a basis for federal subject matter jurisdiction. Here, Petitioner's due process claim is based solely upon his contention that his due process rights were somehow violated when the Tennessee state court approved the *Cox* settlement in 1995. While Petitioner's allegations are patently false, they would arise only in the event Celanese or Shell asserted the preclusive effect of the *Cox* final judgment as a bar to his claims, and Petitioner admits that has not been done.

The Fifth Circuit's Ruling On Petitioner's Civil RICO Claims

First, the Fifth Circuit properly affirmed the District Court's ruling that Petitioner failed to properly plead civil RICO claims because disgorgement is an equitable remedy available only to restrain ongoing or future violations of civil RICO, and Petitioner here admits the alleged wrongful conduct ceased many years ago. The Fifth Circuit's decision applied the plain and unambiguous language of 18 U.S.C. § 1964(a), and is consistent

with the only other United States court of appeal to have addressed the issue.

Second, Petitioner lacks standing to plead civil RICO claims under established authority of this Court because he cannot allege "proximate cause" under § 1964. Petitioner fails the proximate cause requirement because he admits he cannot plead detrimental reliance on any alleged predicate acts of mail and wire fraud, and because his alleged injuries are indirect and subject to numerous intervening causal factors. For this very reason, the Fifth Circuit, following decisions of this Court, recently affirmed the dismissal of nearly identical RICO claims against Celanese and the other Respondents brought by a similarly situated plaintiff, based on similar allegations, and this Court denied the petition for writ of certiorari. *See Summit Props. Inc. v. Hoechst Celanese Corp.*, 214 F.3d 556 (5th Cir. 2000), *cert. denied*, 531 U.S. 1132 (2001) ("*Summit*").

Third, nearly every United States court of appeal to have commented on the issue has rejected or expressed considerable doubt that injunctive relief is available to private plaintiffs, such as Petitioner here, under civil RICO. *See, e.g.*, *Religious Tech. Center v. Wollersheim*, 796 F.2d 1076, 1088 (9th Cir. 1986), *cert. denied*, 479 U.S. 1103 (1987) ("Taken together, the legislative history and statutory language suggest overwhelmingly that no private equitable action should be implied under civil RICO").

I. Proceedings In The District Court

Petitioner seeks to recover damages allegedly arising from polybutylene plumbing installed in his mobile home. (R. 481-82, 486-87, 492-97.) This action was not brought against any of the various companies that designed, manufactured, sold or installed the different types of polybutylene plumbing and their components. Rather, Petitioner has only sued some of the raw material suppliers, such as Celanese, Shell and Respondent E.I. duPont de Nemours & Company, which provided the resins

used by certain companies in the manufacture of certain plumbing components in some types of polybutylene plumbing.[1] (R. 483-84.) Petitioner admits that polybutylene plumbing has not been sold for many years (R. 484), and it is undisputed that Celanese ceased supplying its raw material Celcon for use in this type of plumbing more than a decade ago.

A. Facts Concerning Petitioner's Due Process Claim

In 1995, Hoechst Celanese Corporation and Shell agreed without admitting liability to the *Cox* nationwide class action settlement. Under the *Cox* settlement, these companies, among other things, agreed to commit a minimum of $950 million to provide new plumbing systems and property damage compensation to class members with qualifying leaks. (Celanese App. at 11a, 17a-18a.) That settlement received final approval from the Tennessee state court in November 1995, and all appeals from that final judgment were dismissed in 1996. The final judgment approving the *Cox* settlement bars property owners, like Petitioner here, who have not opted out of the class from pursuing a lawsuit relating to polybutylene plumbing against Celanese or Shell. (*Id.* at 24a.)

The final judgment approving the *Cox* settlement was the end result of intense litigation and arms-length negotiations over a long period of time among all of the various interested parties. (*Id.* at 14a.) In approving the *Cox* settlement, the Tennessee state court held multiple hearings where all interested parties were given the opportunity to be heard and where evidence and briefing both in support of and in opposition to the settlement were submitted on all relevant issues. (*Id.* at 8a, 10a.) After

1. Hoechst Celanese Corporation is a raw material supplier of a variety of materials and plastics, including a plastic resin called Celcon, which was used by third-parties in the manufacture of some parts found in some types of polybutylene plumbing. Hoechst Celanese Chemical Group, Inc. is a commodity or bulk chemical supplier; it did not manufacture or otherwise supply Celcon, and thus it has no connection whatsoever to polybutylene plumbing. (*See* R. 484, 656.)

hearing argument and considering the evidence, the *Cox* court made 73 separate findings of fact and conclusions of law, and ruled that the settlement was "in all respects fair, reasonable, and adequate and in the best interests of the Settlement Class." (*Id.* at 25a.)

Moreover, the *Cox* court found that class counsel "maintained the highest standards of professionalism and advocacy in protecting and promoting the interests of the Class throughout the prosecution and settlement of this case," and rejected various allegations of collusion amongst counsel and the parties. (*Id.* at 30a.) The court also ruled that the class representatives were adequate, as it found no conflicts of interest between the representatives and the absent class members. (*Id.*) In addition, after reviewing the details of the multi-media notice campaign, considering various objections and hearing the testimony of class notice experts, the *Cox* court found that the $10 million *Cox* "notice program is one of the most comprehensive class notice campaigns ever undertaken," that "all reasonable efforts have been made to reach affected consumers," and that "the best notice practicable under the circumstances has been provided to the Settlement Class." (*Id.* at 12a, 24a.) Consequently, the Tennessee court ruled that the *Cox* notice program "met and exceeded" all constitutional requirements. (*Id.* at 24a.)

Despite these facts, Petitioner alleges that his due process rights were somehow violated by the Tennessee state court when it approved the *Cox* settlement. Petitioner claims that in the event Celanese and Shell assert the preclusive effect of the *Cox* final judgment as a bar to his claims, which he admits they have yet to do, he will respond by raising such alleged due process deficiencies. (R. 510-11.) As relief, Petitioner seeks to "preliminarily and permanently enjoin[] [Celanese and Shell] from directly or indirectly invoking [the *Cox* judgment] . . . to bar the Plaintiff and other members of the Class from asserting their rights to recover damages caused by the polybutylene system." (R. 515.)

B. Facts Concerning Petitioner's Civil RICO Claim

In an effort to support a federal civil RICO claim, Petitioner alleges that Celanese and the other Respondents formed an association-in-fact enterprise which Petitioner refers to as the "PB Enterprise." (R. 684-85.) Petitioner claims that the PB Enterprise, among other things, used the mail and wires to make unspecified misrepresentations not to him, but rather to unidentified building code bodies, municipal agencies, developers, builders, and plumbers regarding polybutylene plumbing. (R. 495-96, 498-502, 656-59, 666-67.)

Significantly, Petitioner admits that neither Celanese nor any other Respondent made any representation to Petitioner or any other homeowner regarding polybutylene plumbing or components thereof. To the contrary, Petitioner admits that the only alleged representation he received regarding polybutylene plumbing was supposedly made by the prior owner of his mobile home. (R. 664-65.) According to Petitioner, the prior owner of his mobile home told him that it was plumbed with polybutylene, that polybutylene was an excellent and durable product, and "[i]n reliance on this false representation," Petitioner purchased the home. (R. 665.)

C. Procedural History

Petitioner has made multiple attempts over the past several years to manufacture federal jurisdiction in this case, both by amending his complaint and by attempting to re-characterize his allegations in briefing and at oral argument. As shown below, none of these efforts were sufficient to save Petitioner's claims as a matter of law.

Petitioner's Original Complaint sought monetary damages for allegedly leaking polybutylene plumbing and asserted only common law tort claims. (R. 1-25.) Each Respondent filed a motion to dismiss for lack of federal subject matter jurisdiction. (R. 54-63, 64-84, 85-108.) Petitioner did not respond to those

motions, but instead filed a First Amended Complaint. (R. 179-216.) In an attempt to manufacture federal jurisdiction, the First Amended Complaint asserted claims for civil RICO under 18 U.S.C. §§ 1961, *et seq.*, the Due Process Clause of the Fourteenth Amendment, the Lanham Act under 15 U.S.C. § 1125(a), and common law tort. (R. 195-215.) Respondents moved to dismiss the First Amended Complaint for lack of federal subject matter jurisdiction, failure to state a claim upon which relief could be granted, and failure to plead fraud with adequate particularity. (R. 222-60, 261-97, 298-310.) In response, Petitioner once again amended his complaint. (R. 481-521.) The Second Amended Complaint also asserted claims for civil RICO, alleged violation of the Due Process Clause, alleged violation of the Lanham Act,[2] and common law tort, but did not plead a civil rights claim under 42 U.S.C. § 1983. (R. 498-520; *see also* R. 1007.) Thereafter, Respondents moved to dismiss the Second Amended Complaint. (R. 531-33, 534-36, 537-76.)

Prior to the hearing on Respondents' motions to dismiss, the District Court ordered Petitioner to file a civil RICO case statement to assist the court in determining "whether Plaintiff[] [has] asserted claims under RICO that possess the required level of particularity." (R. 650-51.) Thereafter, Petitioner filed a civil RICO case statement (R. 652-714), and Respondents renewed their motions to dismiss (R. 715-39, 743-46, 748-87). In his civil RICO statement, Petitioner admitted, among other things, that he had not received any representations from any Respondent regarding polybutylene plumbing or otherwise. (R. 664-65.) Apparently recognizing that the Fifth Circuit's decision in *Summit* (*see infra*) foreclosed him from obtaining monetary damages under RICO, Petitioner raised for the first

2. Recognizing the futility of his Lanham Act claim, Petitioner withdrew it (R. 928). *See Seven-Up Co. v. Coca-Cola Co.*, 86 F.3d 1379, 1383 (5th Cir. 1996) (ruling that consumers lack standing to prosecute a claim for false advertising or promotion under § 43(a) of the Lanham Act).

time at oral argument in October 2001 that he sought injunctive relief under civil RICO.[3] (Petition App. at 49.)

Subsequently, the District Court dismissed Petitioner's civil RICO claims against all Respondents on the grounds that, among other things, Petitioner had not pled proximate cause. (Petition App. at 42-48.) As the District Court ruled, Petitioner's civil RICO claims fail to plead proximate cause because, among other things, Petitioner "has not shown that there was any misrepresentation, or reliance thereon, made to [Petitioner] *directly*." (*Id.* at 45 (emphasis in original).) The District Court also dismissed Petitioner's due process claim for lack of federal subject matter jurisdiction because "the relief requested by [Petitioner] requests the Court to review the final order and judgment approving the Tennessee nationwide class action settlement" in contravention of the *Rooker/Feldman* doctrine.[4] (*Id.* at 34-35.)

II. The Fifth Circuit's Decision

Consistent with established jurisprudence of this Court, the Fifth Circuit affirmed the District Court's order, holding:

- That Petitioner's due process claim violated the *Rooker/Feldman* doctrine. (Petition App. at 7-11.) In so ruling,

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3. Petitioner also argued in the District Court that under the so-called target exception, he could prosecute a civil RICO claim against Respondents even though he did not rely directly on any representation made by any Respondent. (Petition App. at 46-48.) However, Petitioner appears to have recognized that this argument too is foreclosed as he did not raise this argument on appeal. *See Sandwich Chef of Texas, Inc. v. Reliance Nat'l Indem. Ins. Co.*, 319 F.3d 205, 223 (5th Cir.), *cert. denied*, 124 S. Ct. 101 (2003) (holding that the target exception is applicable only where, unlike here, the plaintiff "can demonstrate injury as a direct and contemporaneous result of fraud committed against a third party").

4. Subsequently, the District Court entered an order dismissing Petitioner's state law claims without prejudice. (R. 1312.)

the court rejected Petitioner's argument that there is a procedural due process exception to the *Rooker/Feldman* doctrine, explaining that: "A federal court cannot examine the due process deficiencies in *Cox* without disturbing the underlying judgment." (*Id.* at 11.) The court also found that if federal subject matter jurisdiction had existed, Petitioner's due process claim failed to state the requisite joint activity between Respondents and any state actor. (*Id.* at 11-15.)

That Petitioner's civil RICO claims failed to state a claim, explaining that "Section 1964(a) establishes that equitable remedies are available only to prevent ongoing and future conduct." (*Id.* at 17.) In so holding, the court found that Petitioner could not allege that disgorgement would "prevent and restrain" any ongoing or future conduct by Respondents, as Petitioner conceded that Respondents ceased any involvement with polybutylene plumbing long ago. (*Id.*)

REASONS FOR DENYING THE PETITION

I. THE FIFTH CIRCUIT HELD CORRECTLY THAT THE *ROOKER/FELDMAN* DOCTRINE BARRED PETITIONER'S ALLEGED DUE PROCESS CLAIM

Petitioner claims that the Fifth Circuit should have required the District Court to review the *Cox* court's procedural due process findings set forth in *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811-12 (1985) — adequate notice, an opportunity to be heard and participate, the right to opt out, and adequate representation — before ruling that his claim was barred for lack of federal subject matter jurisdiction under the *Rooker/Feldman* doctrine. (Petition at 4, 10-13.) In making this argument, Petitioner turns the *Rooker/Feldman* doctrine on its head. Under this doctrine, federal courts lack jurisdiction to review final state court judgments even if (unlike here) the state

court judgment was incorrect on constitutional issues. As shown below, the Fifth Circuit's decision affirming on *Rooker/Feldman* grounds is consistent with and required by prior decisions of this Court.

A. The Fifth Circuit Held Correctly That Petitioner's Alleged Due Process Claim Is "Inextricably Intertwined" With The *Cox* Final Judgment

In *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923) and *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983), this Court held that federal district courts "do not have [subject matter] jurisdiction . . . over challenges to state court decisions in particular cases arising out of judicial proceedings even if those challenges allege that the state court's action was unconstitutional." *Feldman,* 460 U.S. at 486; *see also Atlantic Coast Line R.R. Co. v. Brotherhood of Locomotive Eng'rs*, 398 U.S. 281, 296 (1970) ("lower federal courts possess no power whatever to sit in direct review of state court decisions"). Federal district courts lack subject matter jurisdiction once a state court has finally adjudicated an issue because Congress has conferred only original, not appellate, jurisdiction on the district courts. *Rooker*, 263 U.S. at 416. For this reason, where, as here, a litigant alleges that a state court judgment was entered in error, that litigant's proper avenue for potential relief is an appeal within the court system of that state, not the commencement of a federal action. *Feldman*, 460 U.S. at 482; *see also Atlantic Coast Line*, 398 U.S. at 296 (party may only "seek vindication of its federal right in the [state] appellate courts").

The Court has also made clear that "[i]f the constitutional claims presented to a United States district court are inextricably intertwined" with the merits of a judgment rendered by a state court, "then the district court is in essence being called upon to review the state-court decision. This the district court may not

do." *Feldman*, 460 U.S. at 483 n.16. In an often cited concurring opinion, Justice Marshall has explained that:

> it is apparent . . . that the federal claim is inextricably intertwined with the state-court judgment if the federal claim succeeds only to the extent that the state court wrongly decided the issues before it. Where federal relief can only be predicated upon a conviction that the state court was wrong, it is difficult to conceive the federal proceeding as, in substance, anything other than a prohibited appeal of the state-court judgment.

Pennzoil Co. v. Texaco, Inc., 481 U.S. 1, 25 (1987) (Marshall, J., concurring). Thus, if a federal court can provide relief only by determining that the state court judgment was erroneous, then the claim is barred by the *Rooker/Feldman* doctrine.

Following this settled authority, the Fifth Circuit recognized that where a claim is inextricably intertwined with the merits of a final state court judgment, that claim is barred under the *Rooker/Feldman* doctrine. Applying this settled rule to Petitioner's alleged due process claim, the Fifth Circuit held that Petitioner's "allegations indisputably denounce the express [procedural due process] findings of the *Cox* state court." (Petition App. at 10.) The Fifth Circuit found further that the "*Cox* court's [procedural due process] findings that allow for certification are 'inextricably intertwined' with Richard's constitutional challenge to the state's compliance with due process requirements." (*Id.* at 11.) Having reached this conclusion, the Fifth Circuit held that "[a] federal court cannot examine the due process deficiencies in *Cox* without disturbing the underlying judgment," and thus Petitioner's claim was barred by the *Rooker/Feldman* doctrine. (*Id.*) As such, the Fifth Circuit's decision is fully consistent with prior holdings of this Court.

B. The Fifth Circuit's Decision Does Not Conflict With Any Decision Of This Court Or Any Other United States Court Of Appeal

Notwithstanding this settled law, Petitioner claims that the Fifth Circuit's decision is in conflict with decisions of other United States courts of appeal because the Fifth Circuit did not review the *Cox* court's procedural due process findings before ruling that his claim was barred under the *Rooker/Feldman* doctrine. (Petition at 11-15.) Petitioner's argument demonstrates a fundamental misunderstanding of the doctrine. The doctrine is jurisdictional in nature, and bars federal courts from sitting in review of final state court judgments. *Feldman*, 460 U.S. at 486.[5] For this reason, among others, every United States court of appeal to have recently addressed the issue has held uniformly that the *Rooker/Feldman* doctrine bars any federal suit which would effectively nullify or overrule a state court judgment, even as to procedural due process issues.

1. The Fifth Circuit's Decision Does Not Conflict With Any Decision Of Any Court Of Appeal In The Context Of A Class Action.

The Fifth Circuit's decision is entirely consistent with every court of appeal which has addressed the *Rooker/Feldman* doctrine in the context of a class action — decisions which Petitioner inexplicably has not cited, much less attempted to distinguish — as those courts held uniformly that federal district courts lack subject matter jurisdiction if a federal court can provide relief only upon a finding that a state court had erred, including as to *Shutts* due process factors. Similarly, and despite Petitioner's argument to the contrary (Petition at 16-17), those

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5. *See also* Suzanna Sherry, *Judicial Federalism in the Trenches: The Rooker-Feldman Doctrine in Action*, 74 Notre Dame L. Rev. 1085, 1101 (1999) ("the *Rooker-Feldman* doctrine is first and foremost an integral part of judicial federalism. Res judicata is about parties; *Rooker-Feldman* is about courts. That difference explains why *Rooker-Feldman* . . . is a jurisdictional doctrine rather than an affirmative defense").

courts of appeal have held uniformly that absent class members, such as Petitioner here, are "parties" to the prior proceeding under the *Rooker/Feldman* doctrine.[6]

For example, in *Kamilewicz v. Bank of Boston Corp.*, 92 F.3d 506 (7th Cir. 1996), *cert. denied*, 520 U.S. 1204 (1997), the Seventh Circuit ruled that absent class members were barred under the *Rooker/Feldman* doctrine from commencing an action in federal district court seeking, among other things, to review a class action settlement which had been approved by an Alabama state court. There, like here, absent class members argued that the federal district court was authorized to review the state court judgment because the state court allegedly had failed to comply with procedural due process. *Id.* at 509-10. Finding that the plaintiffs' "claim in federal court [was] a multi-pronged attack on the approval of the settlement regarding the attorney fees issue," the Seventh Circuit held that the federal action "would run directly into the state court finding, entered after a two-day fairness hearing — that the fees were reasonable. The federal claims are 'inextricably intertwined' with the state court judgment, whether that judgment is right or wrong." *Id.* at 511. As such, the court ruled that the *Rooker/Feldman* doctrine barred the federal district court from adjudicating the plaintiffs' claims. *Id.* at 511-12.

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6. Consequently, Petitioner's citation to *Johnson v. DeGrandy*, 512 U.S. 997 (1994), *Allen v. Allen*, 48 F.3d 259 (7th Cir. 1995) and *Simes v. Huckabee*, 354 F.3d 823 (8th Cir. 2004), is unavailing. None of those cases concerned absent class members seeking relief from a final state court judgment in federal court. To the contrary, those cases stand for the uncontroversial proposition that *Rooker/Feldman* is inapplicable where, unlike here, the party was not represented in the prior state court proceeding or lacked the opportunity to raise their federal claims in the state court proceeding. Of course, Petitioner's argument also runs counter to the representational nature of a class action. *See Shutts*, 472 U.S. at 808 (explaining that "a 'class' or 'representative' suit was an exception to the rule that one could not be bound by judgment *in personam* unless one was made fully a party in the traditional sense") (citing *Hansberry v. Lee*, 311 U.S. 32, 40-41 (1940)).

Likewise, in *Snider v. City of Excelsior Springs, Missouri*, 154 F.3d 809 (8th Cir. 1998), the Eighth Circuit ruled that a "state claim is inextricably intertwined if the federal challenge succeeds only to the extent that the state court wrongly decided the issues before it." *Id.* at 811. There, like here, absent class members claimed that they were not bound by the prior state court judgment, alleging that because "notice was not sent to the class members," they were denied their "procedural due process rights." *Id.* at 812. In rejecting the plaintiffs' claim, the court held that:

> To determine that the plaintiffs here were not "parties" in the state court action would require us to hold that the state court wrongly certified the class and wrongly ordered a final judgment in the condemnation proceeding. As we have held before in a case in which the plaintiffs alleged insufficient notice in a state court action, there is no procedural due process exception to the *Rooker-Feldman* rule.

Id.

Finally, in *In re GMC Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 134 F.3d 133 (3d Cir. 1998), the Third Circuit affirmed the district court's ruling that it lacked subject matter jurisdiction to hear the plaintiffs' challenge to the fairness of a class action settlement approved by a Louisiana state court. In so ruling, the court found that "in order for us to grant [the plaintiffs'] requested relief, we would first have to 'determine that the state court judgment was erroneously entered.'" *Id.* at 143 (citation omitted). Consistent with settled law, the Third Circuit held that "*Rooker-Feldman* bars exactly this sort of intermediate appellate review of state court judgments. . . ." *Id.*

2. The Fifth Circuit's Decision Does Not Conflict With Any Decision Of Any Court Of Appeal Outside The Context Of A Class Action.

From Celanese's review, it appears that every United States court of appeal to have recently addressed the issue outside the context of a class action has confirmed the settled rule that the *Rooker/Feldman* doctrine bars any federal suit which would effectively nullify or modify a state court judgment or any federal suit in which the federal court could provide relief only by determining that the state court judgment was erroneous. *See, e.g.*, *Rosenfeld v. Egy*, 346 F.3d 11, 19 (1st Cir. 2003) (holding that the federal claim was "inextricably intertwined" with the state court proceeding because the "alleged constitutional injury . . . could only exist to the extent that the [state] court wrongly decided to issue . . . the restraining order"); *Noel v. Hall*, 341 F.3d 1148, 1164 (9th Cir. 2003) ("*Rooker-Feldman* bars subject matter jurisdiction in federal district court" where the plaintiff alleges the state court judgment was erroneous);[7] *Kropelnicki v. Siegel*, 290 F.3d 118, 129 (2d Cir. 2002) ("if adjudication of a claim in federal court would require the court to determine that a state court judgment was erroneously entered or was void, the claim is inextricably intertwined with the merits of the state court judgment");

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7. Contrary to Petitioner's assertion (Petition at 13-14), the Ninth Circuit's holdings in *Noel* and *Kougasian v. TMSL, Inc.*, 359 F.3d 1136 (9th Cir. 2004) are fully consistent with the Fifth Circuit's decision. In those cases, the Ninth Circuit held that *Rooker/Feldman* bars federal subject matter jurisdiction where, as here, a "federal plaintiff asserts as a legal wrong an allegedly erroneous decision by a state court, and seeks relief from a state court judgment based on that decision." *Noel*, 341 F.3d at 1164; *Kougasian*, 359 F.3d at 1140 (same). That is precisely what Petitioner asserts and seeks here: namely, that his due process rights were violated because the Tennessee state court somehow did not comply with *Shutts* in approving the *Cox* settlement, and that an injunction should issue barring Celanese and Shell from asserting the preclusive effect of the *Cox* final judgment as a bar to his claims. (R. 510-11.)

Tropf v. Fidelity Nat'l Title Ins. Co., 289 F.3d 929, 937 (6th Cir. 2002), *cert. denied*, 537 U.S. 1118 (2003) (*Rooker/Feldman* doctrine bars a federal suit "[w]here federal relief can only be predicated upon a conviction that the state court was wrong"); *Goodman v. Sipos*, 259 F.3d 1327, 1332 (11th Cir. 2001) ("A federal claim is inextricably intertwined with a state court judgment if the federal claim succeeds only to the extent that the state court wrongly decided the issues before it") (citation omitted); *Allstate Ins. Co. v. The West Virginia State Bar*, 233 F.3d 813, 819 (4th Cir. 2000) (same); *Anderson v. Colorado*, 793 F.2d 262, 264 (10th Cir. 1986) ("this lawsuit essentially seeks to undo the . . . decision of the Colorado state court. Therefore, it fits squarely within the . . . doctrine prohibiting federal district courts from reviewing state-court judgments").

C. Petitioner's Due Process Claim Fails Under The Well-Pleaded Complaint Rule

Petitioner's due process claim also fails under the settled well-pleaded complaint rule. This Court has held that federal subject matter jurisdiction is based only upon the allegations of the plaintiff's well-pleaded complaint. *Merrell Dow Pharms. Inc. v. Thompson*, 478 U.S. 804, 808 (1986) ("the question whether a claim 'arises under' federal law must be determined by reference to the 'well-pleaded complaint'"); *Louisville & Nashville R.R. Co. v. Mottley*, 211 U.S. 149 (1908) (same). As such, this Court has explained that "[t]he federal questions 'must be disclosed upon the face of the complaint, unaided by the answer,'" and "'the complaint itself will not avail as a basis of jurisdiction in so far as it . . . anticipates or replies to a probable defense.'" *Phillips Petroleum Co. v. Texaco, Inc.*, 415 U.S. 125, 127-28 (1974) (citation omitted).

Accordingly, federal question jurisdiction is not created where a party asserts an anticipatory defense as the jurisdictional basis, much less where, as here, a party asserts a potential response to an anticipatory defense as a basis for federal subject matter jurisdiction. *Id.*; *see also Merrell Dow*, 478 U.S. at 808

("A defense that raises a federal question is inadequate to confer federal jurisdiction"); *Franchise Tax Bd. v. Construction Laborers Vacation Trust*, 463 U.S. 1, 10 (1983) (same).

Here, Petitioner's due process claim violates the well-pleaded complaint rule because Petitioner does not assert a separate, cognizable federal due process or civil rights claim, but rather has merely asserted a potential response to an anticipatory defense which Respondents may raise. Specifically, assuming *arguendo* (and contrary to fact and law) that, as Petitioner alleges, his due process rights were somehow violated in the Tennessee state court action, the issue would arise only in the event Celanese and Shell assert the preclusive effect of the *Cox* final judgment as a bar to Petitioner's claims. As Petitioner admits, Celanese and Shell have not raised this potential defense. Thus, Petitioner's due process claim fails under the well-pleaded complaint rule, and does not present a justiciable case or controversy.[8]

II. THE FIFTH CIRCUIT HELD CORRECTLY THAT PETITIONER'S DUE PROCESS CLAIM FAILED FOR THE ADDITIONAL REASON THAT PETITIONER DID NOT ALLEGE THE REQUISITE STATE ACTION

To state a claim under the Due Process Clause of the United States Constitution or 42 U.S.C. § 1983, a plaintiff must allege "the violation of a right secured by the Constitution and laws of the United States, and . . . that the alleged deprivation was committed by a person acting under color of state law." *West v. Atkins*, 487 U.S. 42, 48 (1988). *See also Flagg Bros. v. Brooks*, 436 U.S. 149, 155 (1978) (same). Here, Respondents are private citizens, not acting under color of state law and thus cannot face § 1983 claims, as the Fifth Circuit correctly

8. *See Preiser v. Newkirk*, 422 U.S. 395, 401 (1975) (ruling that an Article III court only has jurisdiction to resolve "a real and substantial controversy . . . as distinguished from an opinion advising what the law would be upon a hypothetical state of facts") (citations omitted).

ruled citing well-settled authority of this Court. (Petition App. at 13-15.)

This Court explained this settled rule recently in *American Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40 (1999) where it held, "[l]ike the state-action requirement of the Fourteenth Amendment, the under-color-of-state-law element of § 1983 excludes from its reach 'merely private conduct, no matter how discriminatory or wrongful.'" *Id.* at 50 (citation omitted). For this reason, where the defendant is a private citizen, the state action or under color of state law element is only satisfied in the highly unusual circumstance where, unlike here, the plaintiff alleges that the state has "so far insinuated itself into a position of interdependence with the [private actor] that it was a joint participant in the enterprise." *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 357-58 (1974). *See also Lugar v. Edmondson Oil Co., Inc.*, 457 U.S. 922, 942 (1982) (holding that private parties are only acting "under color" of law where they have "'jointly engaged with state officials in the prohibited action'") (citation omitted); *Dennis v. Sparks*, 449 U.S. 24, 27 (1980) (holding that under color of state law met only where a private citizen is a "willful participant in joint action with the State or its agents").

Despite this settled authority, Petitioner argues that "[a]pproval of a settlement by a state court constitutes 'state action.'"[9] (Petition at 18-19.) While unclear, it appears Petitioner

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9. Petitioner's citation to the subsequently withdrawn *Epstein v. MCA, Inc.*, 126 F.3d 1235 (9th Cir. 1997) (Petition at 19) is misplaced. The only issue before the Ninth Circuit was whether a securities fraud class action settlement approved by a Delaware state court was entitled to full faith and credit, and had nothing to do with pleading state action to support a due process or civil rights claim. *Id.* at 1238. Moreover, the Ninth Circuit subsequently withdrew that opinion and issued a new opinion on remand that extended full faith and credit to the Delaware state court judgment. *See Epstein v. MCA, Inc.*, 179 F.3d 641, 644 (9th Cir.), *cert. denied*, 528 U.S. 1004 (1999). Similarly (Cont'd)

claims that joint participation between Respondents and a state actor arose because Respondents sought approval by the Tennessee court of the *Cox* settlement, even though Petitioner admits that the *Cox* court was an "innocent" actor which had no knowledge of any alleged wrongful conduct.[10] (*Id.* at 7, 18-19; R. 1014-15.) Petitioner has misstated not only the facts, but the law.

The Court's decision in *Dennis v. Sparks*, 449 U.S. 24 (1980), an action involving allegations of bribery of a state court judge, sets forth the governing standard for a claim such as the one Petitioner attempts here. In *Dennis*, the Court made clear that merely alleging private citizens were involved in a lawsuit, such as Petitioner alleges here, does not make them joint actors with the court, and thus does not involve state action. *See id.* at 28 ("Of course, merely resorting to the courts and being on

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(Cont'd)
unavailing is Petitioner's citation to *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997) (Petition at 19-20), as the case involved a direct appeal of an asbestos personal injury/wrongful death class action settlement approved by a federal court, and also had nothing to do with pleading state action to support a due process or civil rights claim.

10. That Petitioner now claims his complaint alleges facts sufficient to show "judicial or other malfeasance" (Petition at 19), is belied by the pleadings in this case. Neither Petitioner's complaint (which has been amended on two occasions) nor any other papers filed in this case contain a single allegation of any malfeasance on the part of the *Cox* court, much less collusion or other joint activity between the *Cox* court and any Respondent. (R. 1-25, 46-53, 195-215, 311-46, 498-520, 577-93, 973-1101.) Moreover, amending the complaint at this late date to add such conclusory and false allegations is pointless, as it is well settled that "a bare allegation of . . . joint action [with a state official] will not overcome a motion to dismiss" a due process or § 1983 claim. *DeGrassi v. City of Glendora*, 207 F.3d 636, 647 (9th Cir. 2000). *See also Arsenaux v. Roberts*, 726 F.2d 1022, 1024 (5th Cir.1982) (affirming dismissal of § 1983 claim alleging conspiracy between attorney and state court judge where, among other things, "[t]he conspiracy allegations made by [the plaintiff were] conclusory").

the winning side of a lawsuit does not make a party a co-conspirator or a joint actor with the judge"). Rather, the Court held that private citizens must be "jointly engaged with state officials in the challenged action" in order to satisfy the state action element of a due process or civil rights claim. *Id.* at 27-28. *See also American Mfrs. Mut. Ins. Co.*, 526 U.S. at 54 ("a private party's mere use of the State's dispute resolution machinery, without the 'overt, significant assistance of state officials'" is not state action) (citations omitted); *Lugar*, 457 U.S. at 939, n.21 ("we do not hold today that 'a private party's mere invocation of state legal procedures constitutes 'joint participation' or 'conspiracy' with state officials satisfying the § 1983 requirement of action under color of law'").[11] Petitioner does not, nor could he, allege such joint action.

Applying this settled law, the Fifth Circuit ruled that even if a federal court had jurisdiction over Petitioner's due process claim, Petitioner had failed to allege the requisite state action. (Petition App. at 11-15.) In so ruling, the Fifth Circuit found that:

> Richard does not contend that the judge knowingly participated in the alleged conspiracy. Richard only

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11. In an attempt to save his claim, Petitioner argues that state action can be alleged under the so-called "innocent agent doctrine." (Petition at 7, 18.) However, the authority cited by Petitioner for this proposition concerns criminal conduct under 18 U.S.C. § 2(b), which contains no "color of state law" requirement. Rather, § 2(b) provides that a defendant may be criminally responsible as a principal if he "willfully caused an act to be done which if directly performed by him or another would be an offense against the United States." As such, those cases are beside the point. *See United States v. Rashwan*, 328 F.3d 160, 165 (4th Cir.), *cert. denied*, 124 S. Ct. 320 (2003) (conviction for identification fraud); *United States v. Gabriel*, 125 F.3d 89, 99 (2d Cir. 1997) (conviction for false statements); *United States v. Concepcion*, 983 F.2d 369 (2d Cir. 1992) (conviction for assault); *United States v. Smith*, 584 F.2d 731, 734 (5th Cir. 1978) (conviction of firearm dealer); *United States v. Lester*, 363 F.2d 68 (6th Cir. 1966) (criminal conspiracy).

> alleges that [Respondents] conspired with opposing counsel *before* a judge. . . . Richard fails to allege that the state judge was in any way involved in the misconduct. Indeed, Richard characterizes the state judge as "an innocent agent."

(*Id.* at 15 (emphasis in original).) As such, the court ruled that Petitioner had failed to allege joint action between Respondents and a state actor, and thus could not state a due process violation. (*Id.*) Accordingly, the Fifth Circuit's decision is fully consistent with prior holdings of this Court.

The Fifth Circuit's decision is also fully consistent with decisions of every other circuit court to have recently addressed the issue: absent an agreement between a private party and a state actor to violate the plaintiff's constitutional rights (which is not alleged here), "mere recourse to state or local court legal procedures does not . . . constitute 'joint activity' with the state sufficient to subject a private party to liability under section 1983." *Hoai v. Vo*, 935 F.2d 308, 312-13 (D.C. Cir. 1991) (finding no joint activity where the plaintiff claimed that the private party "lied to the court and advanced an 'erroneous and illegal theory of law' in order to obtain the . . . TRO," but admitted that the state court was "an 'unwitting' party to the actions complained of").[12] Thus, the Fifth Circuit's decision is

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12. *See also Tahfs v. Proctor*, 316 F.3d 584, 592-93 (6th Cir. 2003) (holding no state action where there were only "conclusory allegations" that prior state court rulings obtained against the plaintiff were the result of corruption between private parties and state court actors); *Gonzalez-Morales v. Hernandez-Arencibia*, 221 F.3d 45, 49, 51 (1st Cir. 2000) (finding no state action in court's order of attachment, as "something more than mere resort to a state court is required"); *Gale v. Perovic*, 1997 U.S. App. LEXIS 15530, *3 (7th Cir. June 13, 1997) (no state action where private party allegedly had conspired with state court judges to render judgments adverse to plaintiff, as the complaint was "devoid of any hint — that defendants entered into any agreement with any state

(Cont'd)

entirely consistent with every court of appeal to have addressed this issue.

III. THE FIFTH CIRCUIT HELD CORRECTLY THAT PETITIONER'S CIVIL RICO CLAIMS FAILED TO STATE A CLAIM

Petitioner argues that the Fifth Circuit should have permitted him to add a claim for equitable relief under civil RICO in the form of disgorgement of Respondents' past profits. (Petition at 21-22.) The Fifth Circuit rejected this claim because disgorgement is available to private litigants, if at all, only to prevent future conduct. Here, it is admitted by Petitioner that Respondents' allegedly wrongful conduct stopped nearly a decade ago. The Fifth Circuit's decision affirming the dismissal of Petitioner's unpled "claim" for disgorgement not only

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(Cont'd)
judges for the express purpose of depriving [the plaintiff] of his constitutional rights"); *Jordan v. Fox, Rothschild, O'Brien & Frankel*, 20 F.3d 1250, 1265-66 (3d Cir. 1994) (ruling no state action in entry of judgment where there was no agreement between the private party and the state court); *Mershon v. Beasley*, 994 F.2d 449, 451-52 (8th Cir. 1993) (holding no state action where the requisite "mutual understanding, or a meeting of the minds" between the private party and the state prosecutor was "'mere conjecture and speculation'"); *Schucker v. Rockwood*, 846 F.2d 1202, 1205 (9th Cir. 1988) ("Invoking state legal procedures does not constitute 'joint participation' or 'conspiracy' with state officials sufficient to satisfy section 1983's state action requirement"); *Dahlberg v. Becker*, 748 F.2d 85, 87-88, 93 (2d Cir. 1984) (ruling that "the mere invocation by defendants of New York's legal procedures does not constitute joint participation so as to satisfy the statutory requirement under § 1983 that there be a state actor"; no state action where "a judge . . . unknowingly signs a defective order that has been prepared and submitted to him by an attorney"); *Cobb v. Georgia Power Co.*, 757 F.2d 1248, 1251 (11th Cir. 1985) (finding that "one who has obtained a state court order or judgment is not engaged in state action merely because it used the state court legal process"); *Torres v. First State Bank of Sierra County*, 588 F.2d 1322, 1326 (10th Cir. 1978) (same).

followed settled RICO jurisprudence, but is fully consistent with the only other court of appeal to have ruled on the same matter.

Moreover, granting certiorari on the issue of disgorgement would be futile, as the Fifth Circuit was presented with numerous independent grounds upon which to affirm the dismissal of Petitioner's civil RICO claims, including, among other things, Petitioner's admission that he cannot plead proximate causation as required by this Court in *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258 (1992), and that private plaintiffs cannot seek equitable relief under civil RICO. Thus, further review of this matter is not justified.

A. The Fifth Circuit's Decision Followed Settled Law, And Is Fully Consistent With The Only Other Court Of Appeal To Have Ruled On The Issue

The Fifth Circuit's decision is in complete accord with the Second Circuit's holding in *United States v. Carson*, 52 F.3d 1173 (2d Cir. 1995), *cert. denied*, 516 U.S. 1122 (1996), the only other circuit court to have addressed the issue. In *Carson*, the Second Circuit held that 18 U.S.C. § 1964(a) authorizes a party to seek disgorgement as a remedy for a civil RICO violation only where, unlike here, the disgorgement was "designed to 'prevent and restrain' future conduct rather than to punish past conduct." *Id.* at 1182. There, the federal government sought to obtain disgorgement of allegedly ill-gotten gains earned by a defendant who was no longer involved with the racketeering activities. *Id.* at 1180-82. In considering the issue, the court examined the text and purpose of the civil RICO statute, and observed that § 1964(a) is "forward looking, and calculated to prevent RICO violations in the future." *Id.* at 1181. For this reason, the court explained that § 1964(a) confers upon the district courts the power solely to "prevent and restrain" RICO violations, and provides no additional sources of jurisdiction. *Id.* at 1181. *See also id.* at 1182 ("the jurisdictional powers in § 1964(a) serve the goal of foreclosing future violations, and do not afford broader redress"). The court explained further that

the limiting language of § 1964(a) is unambiguous, and instructs that any equitable remedies be tailored to prevent and restrain future or ongoing RICO violations, not to punish past conduct. *See id.* at 1181-82.

Consequently, the Second Circuit held that disgorgement is not available to compensate persons allegedly wronged by civil RICO violators or to punish the violators for past conduct. *Id.* at 1182. The court explained further that disgorgement of ill-gotten gains earned in the past would not serve to prevent or restrain future RICO violations unless the gains were being used to fund or promote the illegal conduct or constituted capital available for that purpose. *Id.*

Applying the plain language of § 1964(a) and consistent with *Carson*, the Fifth Circuit in this case held that "Section 1964(a) establishes that equitable remedies are available only to prevent ongoing and future conduct," and here there is no ongoing or future conduct.[13] (Petition App. at 17.) In so ruling, the Fifth Circuit found that Petitioner "does not seek disgorgement to 'prevent and restrain' the [Respondents] from producing PB plumbing systems. In fact, . . . Richard concede[d] that the [Respondents] no longer market the plumbing systems." (*Id.*) As the Fifth Circuit explained, Petitioner's "disgorgement claim seems to do little more than compensate for the alleged loss," and thus fails to state a proper remedy under § 1964(a).[14] (*Id.*)

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13. Petitioner claims that the Fifth Circuit's interpretation of *Carson* "spells trouble for the Government's civil RICO litigation against the tobacco industry. . . ." (Petition at 22-23 n.17.) Petitioner's claim is unfounded. The D.C. district court found the Fifth Circuit's decision "distinguishable . . . on its facts," as, among other things, "[i]n *Richard*, the parties from whom disgorgement was sought were no longer operating the business in which they had committed the racketeering acts." *See United States v. Philip Morris USA, Inc.*, 321 F. Supp.2d 72, 80 n.9 (D.D.C. 2004).

14. Petitioner's argument that he should have been granted an (Cont'd)

B. Petitioner Lacks Standing To Plead Civil RICO Claims

The District Court also dismissed Petitioner's civil RICO claims for failure to plead proximate causation, which ruling the Fifth Circuit affirmed.[15] (Petition App. at 45.) In *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258 (1992), the leading case on this point, this Court held squarely that a plaintiff has standing to assert a RICO claim only if he can allege, unlike here, an injury "by reason of" (*i.e.*, directly caused by) a violation of the RICO Act. *Id.* at 270-74. *See also Sedima, S.P.R.L. v. Imrex Co., Inc.*, 473 U.S. 479, 496 (1985) (ruling that a RICO "plaintiff only has standing . . . by [reason of] the conduct constituting the violation"). *Holmes* made clear that the "by reason of" language in RICO requires a causal connection between the predicate mail or wire fraud and plaintiff's injury that includes proximate causation. 503 U.S. at 265-68.

Following *Holmes*, the Fifth Circuit recently affirmed the dismissal of nearly identical RICO allegations, by a similarly situated plaintiff, in a polybutylene plumbing action against

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(Cont'd)
opportunity to amend his complaint to add disgorgement allegations should also be rejected. Such an amendment would be futile, as Petitioner cannot allege a cognizable disgorgement claim given that the allegedly wrongful conduct has ceased.

15. While the Fifth Circuit did not reach this issue, it is properly before the Court for consideration, as the parties fully briefed the issue in the lower courts (*see, e.g.*, R. 531-76, 973-1032). *Bennett v. Spear*, 520 U.S. 154, 166 (1997) ("a respondent is entitled . . . to defend the judgment on any ground supported by the record"). Similarly, the Court may consider the other independent grounds which were briefed in, but not decided by, the lower courts for dismissal of Petitioner's civil RICO claims, including failure to plead RICO with adequate particularity, failure to adequately plead that Respondents engaged in mail or wire fraud, failure to plead a RICO "enterprise," failure to plead a pattern of racketeering activity, failure to plead a RICO "investment injury," and failure to plead a RICO conspiracy. (R. 558-65.)

Respondents, and this Court denied the petition for certiorari. *See Summit Props. Inc. v. Hoechst Celanese Corp.*, 214 F.3d 556 (5th Cir. 2000), *cert. denied*, 531 U.S. 1132 (2001). In so ruling, the Fifth Circuit found that where, as here, the alleged civil RICO claim was predicated solely on mail or wire fraud, the plaintiff must plead and prove detrimental reliance upon a representation made by the defendant in order to show proximate cause:

> Today we are invited to read RICO as establishing a federal products liability scheme complete with treble damages and attorney fees for the benefit of end-users of defective products who never relied on manufacturers' alleged misrepresentations of product quality. We are unpersuaded that RICO can be extended so far by such a marriage of distinct duties and liability regimes.

Id. at 557.

Petitioner here admits that he has not received, much less relied upon, any representation made by any of the Respondents. Thus, Petitioner plainly lacks standing to pursue a civil RICO claim against Respondents, and further review of this matter is not warranted.[16] *See id.* ("To hold otherwise would allow the threat of treble damages and attorneys fees to infiltrate garden variety products liability cases whenever marketing promotions

16. As this Court observed in *Holmes*, proximate cause cannot be properly pled where numerous intervening acts and decisions of third parties necessarily occurred between the alleged actions of Respondents and Petitioner's alleged injuries. 503 U.S. at 272-73. Here, there are numerous potential intervening causes between the alleged misrepresentations by Respondents to third parties and Petitioner's claimed injuries. As the Fifth Circuit ruled in *Summit* in rejecting nearly identical civil RICO claims against these same Respondents, "[a]s a product travels in the stream of commerce, inherent defects are carried with it, but fraudulent statements are not . . . The causal connection between a misrepresentation and a subsequent harm . . . vanishes once the product travels beyond the entity who actually relied on the representation. . . ." 214 F.3d at 560.

touted the merits of the products, even if no plaintiff relied on those representations").

C. Private Plaintiffs, Such As Petitioner, May Not Seek Equitable Relief Under Civil RICO

Assuming *arguendo* (and contrary to law and fact) that Petitioner had standing to plead a civil RICO claim and that a party may seek disgorgement for allegedly wrongful conduct that ceased long ago, Petitioner is not entitled to seek equitable relief under civil RICO. Indeed, other than the Seventh Circuit in *Nat'l Org. for Women, Inc. v. Scheidler,* 267 F.3d 687 (7th Cir. 2001), *rev'd on other grounds*, 537 U.S. 393 (2003), every court of appeal to have addressed the issue, in holdings or dicta, has found that private plaintiffs are not authorized to seek equitable relief under civil RICO.

For example, in *Religious Tech. Center v. Wollersheim*, 796 F.2d 1076 (9th Cir. 1986), *cert. denied*, 479 U.S. 1103 (1987), the Ninth Circuit expressly rejected the availability of injunctive relief to private plaintiffs under civil RICO.[17] *Id.* at 1084. In arriving at its conclusion, the *Wollersheim* court looked to the plain text of § 1964, noting that §§ 1964(a) and (b), the only portions of § 1964 that expressly grant equitable relief under the statute, refer solely to the federal courts and "the government." *Id.* at 1082. Section 1964(c), while expressly granting private plaintiffs authorization to pursue treble damages and attorneys' fees under the statute, provides "no express authority to *private plaintiffs* to seek [] equitable relief." *Id.* (emphasis in original). Reconciling the language of §§ 1964(a), (b), and (c), the court concluded:

> [T]he inclusion of a single statutory reference to private plaintiffs, and the identification of a damages

17. The Ninth Circuit recently affirmed its holding in *Wollersheim*. *See Oregon Laborers-Employers Health & Welfare Trust Fund v. Philip Morris Inc.*, 185 F.3d 957, 967-68 (9th Cir. 1999), *cert. denied*, 528 U.S. 1075 (2000) ("'Injunctive relief is not available to a private party in a civil RICO action'") (quoting *Wollersheim*).

> and fees remedy for such plaintiffs in part (c), logically carries the negative implication that *no other remedy* was intended to be conferred on private plaintiffs.

Id. at 1083 (emphasis in original).

While the Fifth Circuit declined expressly to reach this issue in this case (Petition App. at 16), the Fifth Circuit and, from Celanese's review, every other court of appeal to have commented on the issue has expressed "considerable doubt" that injunctive relief is available to private plaintiffs under RICO. *Bolin v. Sears, Roebuck & Co.*, 231 F.3d 970, 977 n.42 (5th Cir. 2000). *See also Switzer v. Coan*, 261 F.3d 985, 992 n.14 (10th Cir. 2001) (same); *Johnson v. Collins Entm't Co.*, 199 F.3d 710, 726 (4th Cir. 1999) ("substantial doubt"); *Ganey v. Raffone*, 91 F.3d 143, 1996 WL 382278, *3 n.6 (6th Cir. July 5, 1996) (unpublished) ("questionable," and finding *Wollersheim* "persuasive"); *Lincoln House, Inc. v. Dupre*, 903 F.2d 845, 848 (1st Cir. 1990) (same); *In re Fredeman Litig.*, 843 F.2d 821, 830 (5th Cir. 1988) ("We find the analysis contained in the *Wollersheim* opinion persuasive. Congress indeed had several opportunities to give express authorization to private injunctive actions but chose not to do so, apparently because it hesitated in the face of the ramifications of that remedy"); *Trane Co. v. O'Connor Secs.*, 718 F.2d 26, 28 (2d Cir. 1983) (expressing "doubts as to the propriety of private party injunctive relief").

Moreover, even under *Scheidler*, Petitioner's disgorgement claim would fail because *Scheidler* does not hold, much less suggest, that a private plaintiff, such as Petitioner here, who lacks standing to assert a civil RICO claim for monetary damages may nonetheless bring a claim for equitable relief. *See id.* at 693-700. Indeed, as this Court ruled in that case, "the threshold question" was "whether plaintiffs have standing to bring their claim." *Nat'l Org. for Women, Inc. v. Scheidler*, 510 U.S. 249,

255 (1994). The Court ultimately held that the plaintiffs did not. 537 U.S. 393, 397 (2003).[18] The result should be the same here.

CONCLUSION

Following well-settled authority, the Fifth Circuit affirmed the dismissal of Petitioner's due process claim and civil RICO claims, and Petitioner offers nothing to justify this Court's review of the matter. For these reasons, Celanese submits that further review of this matter is not warranted, and respectfully requests that the Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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18. *See also Steamfitters Local 420 v. Philip Morris, Inc.*, 171 F.3d 912, 935 n.20 (3d Cir. 1999), *cert. denied*, 528 U.S. 1105 (2000) (affirming dismissal of plaintiffs' claim for injunctive relief because, among other things, "the lack of proximate cause in this case, [and] the remoteness of plaintiffs' alleged injury from defendants' alleged wrongdoing. . . .").

APPENDIX A — FINAL JUDGMENT OF THE CHANCERY COURT FOR OBION COUNTY, TENNESSEE AT UNION CITY, TENNESSEE DATED AND FILED NOVEMBER 17, 1995

IN THE CHANCERY COURT FOR OBION COUNTY, TENNESSEE AT UNION CITY, TENNESSEE

Civil Action No. 18,844

CLASS ACTION

TINA COX, CHARLES HOMER CLOAR, MARY H. CLOAR, MELODY ALFORD, COUNTRY VILLAGE MOBILE HOME PARK, and PHYLLIS BIRMINGHAM, individually and on behalf of all other individuals and entities similarly situated,

Plaintiffs,

v.

SHELL OIL COMPANY, d/b/a SHELL CHEMICAL COMPANY, and HOECHST CELANESE CORPORATION,

Defendants.

FINAL JUDGMENT

This matter is before the Court on motion by the parties for final approval of their proposed settlement as set forth in the Settlement Agreement filed July 31, 1995, as amended by an Amendment dated October 6, 1995, a Second Amendment dated October 24, 1995, and a Third Amendment

dated November 9, 1995 (the "Agreement"). Also before the Court is the Application of Class Counsel for Award of Attorneys' Fees and Expenses, and Awards to the Representative Plaintiffs (the "Application").

A hearing on the motion and Application was held on November 8 and 9, 1995, pursuant to the Court's Order of July 31, 1995, granting preliminary approval of the settlement and the August 7, 1995, order conforming the class definition, under procedures set forth in the August 24, 1995, Order Approving Forms of Notice, Scheduling Fairness Hearing and Setting Opt-out and Objection Dates.

This Final Judgment is entered pursuant to a Final Order Approving the Class Action Settlement, Attorneys' Fees and Expenses, and Awards to Representative Plaintiffs (the "Final Order") which is entered together herewith. The Court has determined that the Class Action Settlement, as encompassed within the Agreement, should be approved as fair, adequate, and reasonable to the Settlement Class under Rule 23.05 of the Tennessee Rules of Civil Procedure, and that the Application should be granted.

The Court has further determined that there is no just reason for delay in the entry of final judgment in accordance with the Final Order pursuant to Rule 54.02 of the Tennessee Rules of Civil Procedure.

Accordingly, it is **ORDERED** that judgment is hereby entered in accordance with the Final Order.

Appendix A

It is further **ORDERED** that the Settlement Class is defined as follows:

> All persons and entities that (1) own real property or structures in the United States in which there was installed between January 1, 1978 and July 31, 1995, polybutylene plumbing with acetal insert or metal insert fittings or a polybutylene yard service line; (2) own or previously owned such real property or structures and have already incurred any cost or expense, by reason of leakage from, or from failure, repair, or removal of, all or any portion of such polybutylene plumbing or yard service line which was installed between January 1, 1978 and July 31, 1995; or (3) will own such real property or structures during the term of entitlement to relief under the Settlement Agreement.
>
> The definition of the Settlement Class excludes:
>
> (1) All persons who, in accordance with the terms of the Settlement Agreement, execute a timely request for exclusion from the Settlement Class; (2) the Defendants; the Released Manufacturers; the parent and any subsidiary, affiliate and controlled entity of any of them; and the officers and directors of each of them; and (3) all parties to *Geno Cioe, et al. v. Shell Oil Company, et al.*, Case No. 662214, and *Robert L. Williams, et al. v. Shell Oil Company, et al.*, Case No. 658403, and related combined actions (Case Nos. 640245,

654709, 656787, 661372, 665521 and 665527) in the Superior Court of the State of California in and for the County of San Diego, and all members of the certified classes in those lawsuits.

It is further **ORDERED** that the Court directs that the settlement be consummated in accordance with the terms and conditions of the Agreement.

It is further **ORDERED** that the Amended Complaint and all claims and causes of action asserted therein are dismissed with prejudice with costs to be paid from the settlement fund in accordance with the terms of the Settlement Agreement.

It is further **ORDERED** that, in the event that the settlement does not become final (as more fully defined in the Agreement) in accordance with the terms of the Agreement, then this Final Judgment and the Final Order shall be rendered null and void and be vacated, and the Agreement shall be rendered null and void in accordance with the provisions thereof.

It is further **ORDERED** that, without affecting the finality of the Final Order and this Final Judgment, the Court shall retain continuing jurisdiction over this action and the settling Parties (as more fully defined in the Agreement), including all members of the Settlement Class; the administration and enforcement of the settlement; and the benefits to the Settlement Class, including for such purposes as supervising the implementation, enforcement, construction, and interpretation of the Settlement Agreement.

It is further **ORDERED** that, subject and pursuant to the terms and conditions of the Agreement, Plaintiffs and all members of the Settlement Class are barred and permanently enjoined from prosecuting (in any forum) against Shell Oil Company and/or Hoechst Celanese Corporation any and all claims, demands, causes of action of every kind and nature, obligations, damages, losses, and costs, whether known or unknown, actual or potential, suspected or unsuspected, contingent or fixed, either arising out of or relating to any of the facts, transactions, actions, or conduct alleged in this action, or that were or could have been asserted or sought in the action, other than any past, present, or future claim for bodily injury (including wrongful death) and associated emotional distress and mental anguish.

It is further **ORDERED** that, in accordance with the above-described Application and the Funding Agreement referred to in the Agreement, the defendants shall pay Plaintiffs' Class Counsel, as attorneys' fees and expenses, the sum of $45 million, plus interest at the rate applicable to federal court judgments entered on July 31, 1995, for the period from July 31, 1995, until the earlier of July 31, 1996, or when paid.

It is further **ORDERED** that, in accordance with Section 25.1 of the Agreement and with the Funding Agreement referred to in the Agreement, the defendants shall pay the sum of $3,000.00 to each single Representative Plaintiff or Representative Plaintiff married couple.

It is further **ORDERED**, pursuant to Rule 54.02 of the Tennessee Rules of Civil Procedure, that the Court hereby

DIRECTS the entry of this judgment as a final judgment based upon the Court's finding that there is no just reason for delay, notwithstanding the Court's retention of jurisdiction to oversee implementation and enforcement of the Agreement as set forth above, and the Court's continuing jurisdiction to provide for supplemental notice (and related proceedings) to potential members of the Settlement Class as to whom the Court previously received requests for exclusion from the Settlement Class.

Dated at Union City, Tennessee, this 17 day of November, 1995.

s/ W. Michael Maloan
W. MICHAEL MALOAN, CHANCELLOR

APPENDIX B — FINAL ORDER APPROVING THE CLASS ACTION SETTLEMENT, ATTORNEYS' FEES AND EXPENSES, AND AWARDS TO REPRESENTATIVE PLAINTIFFS OF THE CHANCERY COURT FOR OBION COUNTY, TENNESSEE, UNION CITY, TENNESSEE FILED NOVEMBER 17, 1995

IN THE CHANCERY COURT FOR
OBION COUNTY, TENNESSEE
AT UNION CITY, TENNESSEE

Civil Action No. 18,844

CLASS ACTION

OBION COUNTY

Paula Rice
Clerk and Master
D.C. & M.

TINA COX, CHARLES HOMER CLOAR, MARY H. CLOAR, MELODY ALFORD, COUNTRY VILLAGE MOBILE HOME PARK, and PHYLLIS BIRMINGHAM, individually and on behalf of all other individuals and entities similarly situated,

Plaintiffs,

v.

SHELL OIL COMPANY, d/b/a SHELL CHEMICAL COMPANY, and HOECHST CELANESE CORPORATION,

Defendants.

Appendix B

FINAL ORDER APPROVING THE CLASS ACTION SETTLEMENT, ATTORNEYS' FEES AND EXPENSES, AND AWARDS TO REPRESENTATIVE PLAINTIFFS

This matter is before the Court on motion by the parties[1] for final approval of their proposed settlement (the "Settlement") as set forth in the Settlement Agreement filed July 31, 1995, as amended by an Amendment dated October 6, 1995, a Second Amendment dated October 24, 1995, and a Third Amendment dated November 9, 1995 (the "Agreement"). Also before the Court is the Application of Class Counsel for Award of Attorneys' Fees and Expenses, and Awards to the Representative Plaintiffs (the "Application"). A duly noticed hearing on the motion and Application was held on November 8 and 9, 1995, (the "Fairness Hearing") pursuant to the Court's Order of July 31, 1995, granting preliminary approval of the Settlement and the August 7, 1995, order conforming the class definition (collectively the "Preliminary Approval Order"), under procedures set forth in the August 24, 1995, Order Approving Forms of Notice, Scheduling Fairness Hearing and Setting Opt-out and Objection Dates.

Notice of the Fairness Hearing was given to potential class members nationwide in accordance with the Preliminary Approval Order and the Court approved notice program. Voluminous pleadings and briefs were submitted by the settling parties in support of the Settlement and in response

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1. The parties are the named individual and representative *Cox* plaintiffs, on behalf of the certified Settlement Class, and defendants Shell Oil Company d/b/a Shell Chemical Company and Hoechst Celanese Corporation.

to all objections and motions filed regarding the Settlement, including the various objections and related papers filed by objector Tony Martin, *et al.*, and affiliated objectors through their attorneys (the "Martin Objectors"). The parties, numerous interested members of the Settlement Class, and others appeared at the Fairness Hearing, either individually or by their respective attorneys. The Court heard and considered evidence in support of the proposed Settlement. This evidence included live testimony, affidavits, documentary and video presentations, as well as oral representations by various attorneys. The attorneys for the parties and others were heard. An opportunity to be heard was given to all other persons requesting to be heard in accordance with the Preliminary Approval Order. This included a significant number of members of the Settlement Class who, in some instances, had traveled great distances from other states to appear and participate in the Fairness Hearing, who were invited to and did make statements and ask questions regarding the terms of the Settlement and the relief it provides.

As more fully set forth below, the Court has determined that the notice given to members of the Settlement Class certified in the Preliminary Approval Order fully and accurately informed the Settlement Class members of all material elements of the proposed Settlement; was the best notice practicable under the circumstances; was valid, due, and sufficient notice to all Settlement Class members; and complied fully with Rule 23 of the Tennessee Rules of Civil Procedure, the United States Constitution, and any other applicable law.

Appendix B

OPINION

The Court has greatly benefited from the fine briefs and oral arguments of the attorneys in this case, all of whom are worthy adversaries, and appreciates the manner in which they have conducted themselves in this most difficult, complex, and hotly contested litigation. Great credit must be given to Judge Richard Silver of Monterey County, California for his initiative to coordinate a settlement conference with the *Cox* and *Spencer*[2] parties. The revised *Cox* Settlement is due, in no small part, to his efforts. The Court also commends Judge Hardaway of Greene County, Alabama, for his willingness to join in this unprecedented effort by three state courts to coordinate and settle competing national class actions. As to the settling parties, the plaintiffs, the plaintiff class, Shell Oil Co., and Hoechst Celanese Corp., the Court acknowledges that if it were not for your recognition of this opportunity to reach a global settlement of these issues, all of these efforts would have been in vain. You have put aside your armor and your hardened positions from years of battle and have finally made peace.

Compromises are favored in the law. Neither this Court, nor any court, has the resources to fully litigate all issues, nor is it always fair to the parties to do so. The time, cost, and lack of finality of protracted litigation require certain matters to be settled. The polybutylene plumbing litigation's time has come. Closure is not only appropriate, but timely.

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2. *Spencer, et al v. Shell Oil, et al,* Case No. CV 94-074, Circuit Court of Greene County Alabama, Honorable Eddie Hardaway, Jr., presiding.

Appendix B

The parties to this and to the many other individual and group cases that have comprised the polybutylene plumbing litigation have fought long and hard with varying degrees of success and defeat; however, the affected party, the consumer, has seen very little benefit from these efforts. The *Cox* settlement agreement is a compromise. In every compromise, each side must abandon or set aside its ideal position and reach an agreement that is fair and reasonable to all concerned under the circumstances, and not insist on terms only beneficial to one party. The *Cox* settlement is not perfect. I would have preferred that the Agreement include no leak requirements and a larger claims "window" for class members. The Court has some concern the $75 million cap on past damages may not adequately pay all past damages in full; however, these concerns must be weighed in light of the numerous unique advantages to the consumer that the *Cox* settlement does provide.

The Court finds the Settlement is fair, adequate and reasonable.The $950 million dollars is a minimum contribution of the defendants to those who are aff ted by polybutylene plumbing. When the Court initially gave preliminary approval to the proposed Settlement, this factor was the leading factor in granting that approval. As counsel for the parties have confirmed at various times in open court as the hearings have progressed in this matter, the initial funding commitment (now increased to $950 million) may ultimately be more if funds are expended and provided by the defendants and if other responsible parties contribute to the fund in the future. Due to the uncertainty of the size of the class and how many claims will ultimately be filed, this Court would not have approved a "limited fund" which

provided less than full relief while demanding full release. If the worst case does present itself, that is, if the class is as large as six million people, all claims are presented, and the fund is totally expended; the only prejudice to the consumer will be the delay caused by the filing of claims and payment of funds. The Agreement tolls statutes of limitations for class members. The Agreement provides that any consumers not fully reimbursed or compensated under the terms of the Agreement would be able to pursue all legal and equitable claims and remedies (including punitive damages) individually and as a class.

The Court finds the notice program is excellent. As specified in the findings below, the evidence supports the conclusion that the notice program is one of the most comprehensive class notice campaigns ever undertaken. The Court is satisfied that all reasonable efforts have been made to reach affected consumers.

The Court must also consider the complexity, the expense, and the likely duration of these proceedings if settlement were not reached and approved. The Court must weigh the benefits of settlement against the likely outcome of litigation. As the Court has already stated, much has been spent and much has been done over the past years in group and individual polybutylene pipe litigation across the country, but not much has been accomplished for the benefit of the consumer. The claims in *Cox* and *Spencer* each have their own legal problems, which, if fully litigated, would delay the ultimate resolution of these cases for many years to come. If litigated, complex legal issues would be presented, such as statutes of limitations and repose, choice of appropriate

state laws, liability, and measure of damages. All of these issues, if litigated and appealed, could clog the courts across the country for years to come. There is a question as to whether some state courts would give full faith and credit to another state court's determination of these issues.

It is an important aspect of the Settlement that the plaintiffs' attorney's fees and costs are paid by the defendants in addition to the settlement fund, and are not deducted from the settlement fund. In the absence of a comprehensive Class Settlement now, as presented here in *Cox*, after the resolution of the contentious issues described above, any ultimate recovery available for consumers would be reduced by attorney's fees. These normally range from a third to forty percent. None of this delay, risk, mounting transaction costs and reduction of recovery by individual fees would be in the long-term interest of the consumer. In *Cox*, the attorney's fees requested are much less: approximately five percent of the settlement fund; moreover, unlike a typical contingent fee, they are not paid from the fund. The request for fees in the case is approved. The Court finds that they are reasonable under the circumstances, and the Court is pleased to approve them.

The Court is pleased with the reaction of the class members to the proposed Settlement. The Court is greatly comforted by the small number of individual opt-outs, the removal of objections by *Spencer* class counsel and by Tony Martin, who is represented by the Fleming group, and the support expressed by the consumers who testified at the Fairness Hearing. The Court finds that the Consumer Plumbing Recovery Center ("CPRC") claims facility

procedures which have been outlined to the Court and which are provided for in the Agreement, appear to constitute a simple, consumer-friendly and efficient method of adjusting the claims in this case.

The discussions and negotiations that ultimately lead to the settlement presented for Court approval were, from all reports and from the Court's own observation, intensive, exhaustive, and often heated. The Court finds the Agreement is the result of good faith, arms-length, and non-collusive negotiations. The Agreement is fair, adequate, and reasonable under the circumstances, and it is approved.

ADDITIONAL FINDINGS AND CONCLUSIONS

The entire matter of the proposed Settlement and the Application having been fully heard and duly considered by the Court, the Court further FINDS and CONCLUDES, in addition to the findings and conclusions in the foregoing Opinion, as follows:

1. The polybutylene plumbing litigation has been pending, in various forms and in various courts around the country, for more than a decade. It has included individual cases, cases with large numbers of individual plaintiffs, and putative nationwide or statewide class actions brought in federal court and in many state courts.

2. The first nationwide polybutylene plumbing class action was filed in September 1993 by lawyers who are now members of the team of *Cox* Class Counsel. The action,

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Robert Beeman, et al. v. Shell Oil Company, et al., No. 93-047363, was filed in a state district court in Harris County, Texas.

3. Over the course of many months of intensive negotiations, involving a neutral mediator at many critical junctures, a tentative settlement of the *Beeman* case was achieved in October 1994. In February 1995, however, the Texas state court denied preliminary approval of that settlement without comment.

4. After the Court in this case certified the nationwide class on June 13, 1995, *Cox* Class Counsel joined with the plaintiffs' attorneys in the *Beeman* action to prosecute this case for the benefit of mobile and site-built homes with polybutylene plumbing across the country.

5. Collectively, this combined team of Class Counsel included highly qualified and well-regarded lawyers with extensive class action and complex litigation experience, as well as lawyers with vast experience in polybutylene plumbing litigation.

6. Class Counsel then were able to negotiate a settlement generally patterned after that originally arrived in *Beeman*, although the minimum funding commitment was $100 million greater, other features were added, and only two of the three *Beeman* defendants, Shell and Celanese, were involved.

7. Because of the pendency of a nationwide class action in Greene County, Alabama, and of other polybutylene actions

around the country, with many brought as class actions, including an uncertified case for a putative statewide mobile homeowner class in the Superior Court of Monterey County, California,[3] Judge Hardaway and this Court agreed that Judge Silver in Monterey would further the cause of final resolution of polybutylene plumbing litigation if he was appointed to serve as a settlement judge for all three courts.

8. Judge Silver issued an October 12, 1995 *Order Setting Settlement Conference* with the endorsement of this Court and Judge Hardaway, to convene the coordinated settlement process. Other state courts with proposed class actions were asked, by the parties and/or by Judge Silver, to dismiss or stay their proceedings in deference to the coordinated settlement effort in order to give it an opportunity to succeed, undistracted by collateral litigation.

9. Accordingly, from October 23, 1995, through November 7, 1995, the day before the Fairness Hearing in this Court, intensive and continuous global settlement negotiations were conducted among *Cox* Class Counsel, the *Spencer* counsel, and defendants' counsel and representatives through the mediation and supervision of Judge Silver.

10. As a result of these concentrated efforts, a comprehensive settlement was reached, resulting in significant enhancements to the Settlement as it was originally presented to the Court and preliminarily approved on July 31, 1995.

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3. *Meers, et al vs. Shell Oil, et al,* Case No. M 30590, Superior Court of the State of California, County of Monterey, Honorable Richard M. Silver, presiding.

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11. The resulting Settlement, documented and as presented for final approval at the Fairness Hearing, provides consumers with a recovery program consisting of reimbursement of otherwise unreimbursed expenses for repairs to and replacement of leaking polybutylene plumbing systems and property damage caused by such leaks, as well as an extensive program for replacement of such leaking plumbing systems.

12. Some of the features of this Settlement are these:

a. Free replacement of polybutylene plumbing systems installed since January 1, 1978, if two or more qualifying leaks occurred before August 21, 1995, or if only one such leak occurs either in the two years following that date or during a period (of from 10 to 16 years, depending on the type of structure) following installation of the system;

b. Reimbursement of the unreimbursed expenses of plumbing repairs, replacements, and property damage from January 1, 1978, to August 21, 1995, up to $75 million will be distributed, *pro rata* if necessary, for these expenses; and property damage after August 21, 1995, at 100 cents on the dollar;

c. An unlimited funding potential, with the defendants committed to to initially provide up to $950 million for the relief; if additional funds are required, the defendants will either provide them, or litigation will be resumed with all applicable statutes of limitations and repose tolled in the interim;

d. Provision for additional relief to eligible members of the Settlement Class who experience special needs in connection with qualifying leaks;

e. A comprehensive notice program, including notice every three years through the life of the program, which ends in 2009; and

f. The payment of class counsel's attorneys' fees and expenses in addition to the $950 million reserved for relief for the Settlement Class.

13. The Court is not aware of any other class action settlement with successive notices as provided in the *Cox* Settlement.

14. In reaching this Settlement, the defendants have foregone very significant defenses and issues which could have precluded or limited liability as to some or many class members' claims. These include the statutes of limitations and repose, selection of the appropriate states' laws applicable to various issues, the "economic loss" limitation on recoveries of the type sought here, the lack of privity between the members of the Settlement Class and the defendants, the fact that many of the members of the Settlement Class purchased their structures "as is," and, of course, the risk that plaintiffs would not be successful in proving their allegations. In agreeing to this Settlement, the defendants have displayed commendable corporate responsibility, responsiveness, and good will toward consumers.

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15. The Court appointed Rust Consulting, Inc. and Kinsella Communications Ltd. as class notice providers in this case. Richard Redfern, president of Rust Consulting, and Katherine Kinsella, president of the communications firm bearing her name, testified at the Fairness Hearing. The Court also considered Ms. Kinsella's affidavit and the affidavit of Jeffrey Dahl, Executive Vice President of Rust Consulting, in connection with their activities as notice providers.

16. *Cox* Class Counsel and the notice providers worked with Todd B. Hilsee, an experienced class action notice consultant, to design a class notice program of unprecedented reach, scope, and effectiveness. Mr. Hilsee was accepted by the Court as a qualified class notice expert at an earlier hearing to approve the commencement of the notice program. He testified at the Fairness Hearing, and his affidavit was also considered by the Court, as to the operation and outcome of this program.

17. The above-mentioned individuals provided documents, information, and affidavits at the outset of the notice period that assisted the parties in designing, and the court preliminarily approving for implementation, a singularly comprehensive and creative notice program.

18. Beginning in August, 1995, and extending into October, 1995, an extensive notice effort was undertaken in this case to implement the Court approved notice program specified in the Preliminary Approval Order.

19. Since not all Settlement Class members were known or readily identifiable, the notice program implemented in

this case combined multimedia publication (newspapers, magazines, radio and television), individual mailed notice, ongoing press and media outreach, and a toll-free telephone information service. The purpose of the program was to make potential Settlement Class members aware of the Action and the Settlement, and to encourage them to identify themselves to the notice providers, so they could receive further written notices and information, and be placed on the notice providers' Settlement Class member database.

20. Commencing on or before August 21, 1995, which is the Initial Notice Date as specified in the Agreement, more than 5.6 million copies of the Court approved Notice of Class Action and Proposed Settlement were mailed, by first class mail or overnight service, to Settlement Class members in accordance with the Preliminary Approval Order.

21. During September, 1995, the Court approved summary notice was published in *Parade* Magazine, *USA Weekend, People* Magazine, and *TV Guide* in accordance with the Preliminary Approval Order. The combined circulation of these consumer publications and national magazines is over 73 million. During August and September, 1995, Court approved notice appeared twice in Friday editions of *USA Today*, with combined circulation of over 4.7 million.

22. Also during September, 1995, the Court approved summary notice appeared in 201 daily and weekly newspapers in 13 targeted states (Alabama, Arizona, California, Colorado, Florida, Georgia, Louisiana, Maryland, Nevada, North Carolina, South Carolina, Texas, and Virginia) and the District of Columbia. The combined circulation of

these newspapers exceeds 23.6 million. In addition, the notice appeared in Spanish in 38 Hispanic newspapers, with a combined circulation over 3 million, in 29 media markets during September, 1995. Moreover, the notice appeared in 247 daily, weekly, bimonthly, and monthly African-American newspapers with a combined circulation of nearly 6 million.

23. Notices were also published in the October, 1995, editions of various trade publications, comprising a total circulation of 244,000.

24. A 30-second spot television notice was produced and appeared 213 times from August 21, 1995, through September 3, 1995, on national and cable television, including on such networks as ABC, NBC, CBS, TNN, CNN, and TNT. During the same period, a 30-second Spanish language television notice appeared 18 times on the Univision Network, a popular Spanish language network.

25. A press release, a media advisory, a public service announcement, a video news release, a radio news release, and a press kit were all prepared and disseminated as part of the notice program in this case. The press release went to 2,000 newspapers, wire services, magazines, and broadcast points across the United States through PR Newswire. The press release and media advisory were also disseminated to 469 media outlets, specifically targeting consumer reporters and media in the top 250 media markets and 84 local daily newspapers in the 13 targeted states and the District of Columbia. 142 outlets, with a combined circulation of more than 14.5 million, have confirmed using the press materials to publish articles. It is estimated that the

public service announcement was broadcast by radio stations yielding nearly 2.9 million gross impressions; an additional 5.5 million impressions are estimated from the broadcast of the radio news release. The video news release was used by at least 21 outlets with combined viewership of more than 1.7 million. Finally, a two-column article was provided to 10,000 daily and weekly newspapers.

26. Court approved notice forms were disseminated through various online computer services, including CompuServe, Prodigy, and America Online, and with Legal Link on the Internet.

27. The various forms of published notice provided recipients with a toll free "800" telephone number to which potential Settlement Class members could call to obtain further information and to request the full notice packet to be mailed to them. The telephone message was updated as the notice program progressed, and commonly raised questions were answered by live operators, in English or Spanish as required by the caller. The parties prepared and updated scripts and information by which the operators were able to provide the general information commonly requested by callers.

28. The toll-free telephone facility established for notice purposes in this case received more than one million telephone calls in response to the published notice program.

29. Over 195,000 requests for a claim form have been received by the notice providers.

30. Mr. Hilsee demonstrated, by affidavit and in live testimony at the Fairness Hearing, a number of significant facts regarding the reach and effectiveness of the notice. The national media campaign reached an extraordinarily high percentage of United States adults aged 35 years and over: approximately 114 million individuals, or 92.11 % of this population. Each of these adults was exposed to the national media notice an average of 4.01 times. The national media campaign also reached approximately 151 million persons in the United States aged 25 years and over, representing 90.88 % of this population. Each of the individuals in this larger, secondary target group was reached an average of 3.76 times by the national media notice, a frequency that also exceed the primary target reach in other class actions. These are higher reach and frequency statistics than have been found adequate by courts in other class actions. These data do not include the reach of the notice campaign through means other than the national paid notice campaign, such as the television and print notices targeted to Hispanic and African-American media, the local newspaper notices, the non-paid media and direct mail notices to millions of Settlement Class members.

31. Multifaceted notice programs like that implemented in this case have been approved by other courts and utilized successfully for similar purposes in large consumer or product class actions such as this one, where most class members are not individually identified at the outset. *See, e.g., In re Domestic Air Transportation Antitrust Litigation,* 141 F.R.D. 534 (E.D. Pa. 1992); 148 F.R.D. 297 (E.D. Pa. 1992); *In re Silicone Gel Breast Implant Products Liability Litigation,* MDL 926 (N.D. Ala. 1994); *Roberts v. Bausch & Lomb, Inc.,* 94-C-1144-W (N.D. Ala. 1995).

32. As other courts have done with respect to the less comprehensive notice programs they approved, this Court finds that the notice program described above, as designed and implemented, met and exceeded the requirements of the United States Supreme Court, Tennessee's Rule 23, due process and the Constitution, as construed in *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985) and its progeny.

33. Thus, the best notice practicable under the circumstances has been provided to members of the Settlement Class. That notice accurately and adequately advised them of this action; the proposed Settlement and its terms, features, and benefits; their rights and options; and the applicable procedures and deadlines for exercising them.

34. A full opportunity has been provided to the members of the Settlement Class to participate in the Fairness Hearing, both orally and by way of written submission to the Court.

35. The Court previously found the requirements of Rule 23 of the Tennessee Rules of Civil Procedure were met and certified a nationwide class for litigation and trial purposes in the Order of National Class Certification. While such certification was and is contested by the defendants, they have agreed to class certification for settlement purposes, to promote a comprehensive, classwide resolution of polybutylene pipe litigation.

36. The numerosity, typicality, commonality, and adequacy requirements of Rule 23.01 of the Tennessee Rules of Civil Procedure are satisfied as to the Settlement Class in connection with the Settlement in this case.

37. In accordance with Rule 23.02(3), common issues of fact and law predominate and make certification of the Settlement Class for settlement purposes efficient and appropriate. The members of the Settlement Class have been afforded the right and opportunity to exclude themselves from the Settlement Class.

38. The settlement encompassed within the Agreement is in all respects fair, reasonable, and adequate and in the best interests of the Settlement Class.

39. The Court-approved notice program provided clear and simple procedures and instructions for the submission of objections by or on behalf of Settlement Class members. For example, paragraph 10 of the Court-approved *Notice of Class Action and Proposed Settlement* required objections to be submitted, in writing, postmarked not later than October 20, 1995, and further stated, "if you do not comply with the procedure and the deadline stated herein, you may not be entitled to be heard at the Fairness Hearing or to otherwise contest the approval of the Settlement, or to appeal from any orders or judgments of the Court entered thereon." All objections, however styled, that failed to comply with the procedures and deadlines set forth in the notice program, are hereby found to be procedurally deficient and are disqualified in accordance with the foregoing statement.

40. The Court has also reviewed the Principles of Agreement dated November 7, 1995, executed by the parties, including the terms applicable to U.S. Brass Corp., Eljer Manufacturing, Inc., and Eljer Industries, Inc. The terms of the Principles of Agreement appear to be reasonable and in

accordance with the efforts being made to seek a global resolution of all litigation pertaining to the issues among the parties. The prior *Cox* settlement was unclear as to the effect of funds received from U.S. Brass Corp., Eljer Manufacturing, Inc., and Eljer Industries, Inc. The revised settlement makes clear that amounts received from U.S. Brass and/or Eljers will add to the minimum fund of $950 million. If that settlement is perfected and approved by the United States Bankruptcy Court, the minimum fund would substantially increase.

41. In independently determining to approve the Settlement and the Application, the Court has considered the substance of all objections to the Settlement, whether timely, qualified or not, including those by the Martin Objectors and others that have since been withdrawn or stricken.

42. Certain objectors have asserted that the proposed Settlement must be reduced by a proposed settlement of claims against du Pont in the *Spencer* case pending in the Circuit Court of Greene County, Alabama, which the objectors characterized as a $120 million settlement.

43. The proposed du Pont settlement has not been approved by the *Spencer* court, and this Court may not speculate whether it will be approved by the *Spencer* court.

44. The proposed du Pont settlement in *Spencer* purports to entitle a claimant to a rebate of 8% of monies the claimant pays for replumbing his or her structure.

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45. The Settlement before this Court, in the minimum amount of $950 million, provides for the assignment of Settlement Class members' claims against du Pont and others to defendants Shell and Celanese.

46. Objectors are incorrect in asserting that the "credit" arising from the assignment reduces the Defendants' contribution to the Settlement. The original *Cox* settlement was $850 million to be paid by the Defendants. The revised *Cox* settlement requires the Defendants to pay a minimum of $950 million to consumers with assignment of rights, against du Pont, regardless of whether du Pont ultimately participates in the settlement. The revised *Cox* settlement substantially increases benefits to consumers.

47. Contrary to objectors' assertions, all interest earned on funds held by the CPRC will be for the benefit of the Settlement Class and will not be credited against the Defendants' obligations under the Agreement.

48. Because of the structure of the Settlement, the Defendants' obligation to fund the CPRC on an ongoing, as-needed basis, and the Defendants' obligation to pay reimbursement for Past Expenses in a reasonable time after the close of the one year claim filing period on August 21, 1996, and any related opt out period that may be necessary under § 4.5.1 of the Agreement, there is no significant ability by the Defendants to delay payments due under the Settlement.

49. Objectors are incorrect in asserting that, even before the Defendants' initial funding commitment was increased

from $850 million to $950 million, the "net funding by Shell and Celanese under . . . the agreement [was) only $547 million."

50. The notice provided to the Settlement Class was neither misleading nor defective.

51. The defendants are each responsible for one-half of the settlement obligations as specified in the Settlement Agreement unless and until the respective liabilities are established by arbitration under the Funding Agreement.

52. The *Cox* Class Counsel have undertaken a reasonable risk that each of the defendant companies will be solvent and capable of fulfilling its obligations under this agreement.

53. Had the plaintiffs settled at separate times with Shell and Celanese, it is highly unlikely that there would ever have been joint and several liability between them.

54. The Settlement is more favorable to the Settlement Class than litigation if it is assumed that one of the defendants will, some years from now, become unable to pay all claims, since the class will receive payment under the Settlement promptly, thereby reducing the number of claimants who would be subjected to proving claims in a bankruptcy.

55. The Agreement provides broad ranging powers for the enforcement of a defaulting defendant's obligations, including the full panoply of equitable powers this Court possesses.

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56. The Agreement expressly provides that the default of one defendant does not exonerate the other defendant of its obligations under the Agreement.

57. Past expenses will be compensated after expiration of one year from August 21, 1995, the Initial Notice Date under the Agreement.

58. Claimants will not, contrary to an objection, be required to wait 14 years to receive their entitled reimbursements or distributions under the Agreement.

59. The so-called exclusion of a "hot water heater leak"—a leak occurring within six feet of piping measured from the take-off at the unit's hot water heater-does not apply to any claim for reimbursement of repair costs and property damage. Thus, the only exclusion is for eligibility for a replumb, and even there, the exclusion applies only if (1) it is the first leak in the unit *and* (2) it can be repaired without cutting into the unit's walls, ceilings, or floors.

60. Therefore, a replumb will be provided under the Agreement even if the hot water heater leak is the first leak, if to repair the leak would require cutting into the walls, ceilings, or floors of the unit. Similarly, there will be a replumb if the hot water heater leak is the second leak in the system.

61. The claimant has the right to select the contractor to do the replumbing and property damage repair work.

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62. Nothing in the Agreement abrogates the warranty of work done by the contractors and suppliers of pipe and other components in the replumb.

63. The Agreement permits special relief involving unusual hardship, so long as the CPRC Ombudsman and President concur that such relief should be provided. This provision allows the CPRC to provide relief from a breach of warranty arising out of replumbing work, where the warrantor fails to provide or cannot provide corrective relief. CPRC § VI, E.

64. There is no factual basis for the asserted objection that there is any conflict of interest with respect to the *Cox* Class Counsel.

65. The *Cox* Class Counsel maintained the highest standards of professionalism and advocacy in protecting and promoting the interests of the Class throughout the prosecution and settlement of this case.

66. There is no factual basis for the asserted objection that settlements in individual cases are improperly disparate from the *Cox* Settlement.

67. There is no need to provide additional notice to the entire Settlement Class by reason of the revised terms of the Settlement since the Court approved the notices disseminated to the Settlement Class. All changes have been to improve the Settlement over that described in the notices, and none of the changes has an adverse impact on any Class member.

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68. As class action jurisprudence has accumulated, various federal and state courts, in Tennessee and elsewhere, have articulated criteria and factors that courts may consider in evaluating proposed settlements for final approval. *See, e.g., Third Nat'l Bank v. Scribner,* 212 Tenn. 400, 410, 370 S. W.2d 482 (1963); *Clark Equip. Co. v. International Union, Allied Indus. Workers,* 803 F.2d 878, 880 (6th Cir. 1986), *cert. denied sub nom. Jones v. Clark Equip. Co.,* 480 U.S. 934 (1987); *Williams v. Vukovich,* 720 F.2d 909, 922 (6th Cir. 1983); *Bailey v. Great Lakes Canning, Inc.,* 908 F.2d 38, 42 (6th Cir. *1990); In re Warner Communications Sec. Litig.,* 618 F. Supp. 735 (S.D.N.Y. 1985) *aff'd,* 798 F.2d 35 (2d Cir. 1986); *Girsh v. Jepson,* 521 F.2d 153, 157 (3d Cir. 1975). This Court has been guided, generally, by the procedures and criteria recommended in the *Manual for Complex Litigation*, 3d ed. (Federal Judicial Center 1995), §§ 30.4, *et seq.*, since the federal and Tennessee class action provisions and criteria are consistent.

69. Factors that may be considered in assessing the fairness, adequacy, and reasonableness of the proposed settlement include: the plaintiffs' likelihood of ultimate success on the merits balanced against the amount and form of relief offered in the settlement; the stage of the proceedings at which the settlement is reached; the extent of cumulative discovery or investigation; the nature of the settlement negotiations; the costs, risks, and delays of establishing liability and damages; the views of experienced counsel; the reaction of the class members themselves; the comparison of the settlement's benefits with other settlements or with the alternative of continuing litigation; and whether approval of the settlement is in the class members' and the public

interest. As the above opinion and findings demonstrate, consideration of these and other recognized factors, such as the participation and recommendations of an experienced and able settlement judge and the testing of the settlement's merits in the clash of adversary proceedings, demonstrate the Settlement's entitlement to approval.

70. Expert opinions have been submitted in support of the proposed Settlement. (*See* Opinion of Professor David Rosenberg, Affidavit of Professor Paul H. Rubin). In approving the Settlement, the Court has considered these opinions.

71. The Court will retain jurisdiction and address a supplemental notice program, on a joint motion of the settling parties, to advise all members of the Settlement Class on whose behalf a purported or actual request for exclusion was received of the enhanced Settlement, providing those individuals with a new opportunity to request exclusion from the Settlement Class in light of the enhanced Settlement.

72. There is no just reason for delay in the entry of a final judgment and decree by reason of such supplemental notice and related proceedings or of the retention by the Court of continuing jurisdiction to oversee the implementation and enforcement of the Agreement and Settlement.

73. The Application is fair and should be granted.

Based upon the foregoing, it is hereby **ORDERED, ADJUDGED, and DECREED:**

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1. The Court has jurisdiction over all claims asserted in the Action on behalf of all Settlement Class members and over all parties to the Action, including all members of the Settlement Class.

2. The Settlement Class is defined as follows:

> All persons and entities that (1) own real property or structures in the United States in which there was installed between January 1, 1978 and July 31, 1995, polybutylene plumbing with acetal insert or metal insert fittings or a polybutylene yard service line; (2) own or previously owned such real property or structures and have already incurred any cost or expense, by reason of leakage from, or from failure, repair, or removal of, all or any portion of such polybutylene plumbing or yard service line which was installed between January 1, 1978 and July 31, 1995; or (3) will own such real property or structures during the term of entitlement to relief under the Settlement Agreement.
>
> The definition of the Settlement Class excludes:
>
> (1) All persons who, in accordance with the terms of the Settlement Agreement, execute a timely request for exclusion from the Settlement Class; (2) the Defendants; the Released Manufacturers; the parent and any subsidiary, affiliate and controlled entity of any of them; and the officers and directors of each of them; and (3) all parties

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to *Geno Cioe, et al. v. Shell Oil Company, et al.*, Case No. 662214, and *Robert L. Williams, et al. v. Shell Oil Company, et al.*, Case No. 658403, and related combined actions (Case Nos. 640245, 654709, 656787, 661372, 665521 and 665527) in the Superior Court of the State of California in and for the County of San Diego, and all members of the certified classes in those lawsuits.

3. All members of the Settlement Class who have not timely elected to be excluded from the Settlement Class are members thereof and are bound by this Order and the Final Judgment being entered herewith.

4. Pursuant to Rule 23.01, Rule 23.02, and Rule 23.03 of the Tennessee Rules of Civil Procedure, the Court confirms the certification of the Settlement Class provided in the Preliminary Approval Order and maintains such certification for purposes of final approval of the settlement.

5. The Class Representatives and Plaintiffs' Class Counsel designated in paragraph 8 of the Court-approved *Notice of Class Action and Proposed Settlement* to represent the Settlement Class are hereby confirmed.

6. The Agreement and the Funding Agreement entered into by the Defendants pursuant to the Agreement are hereby made part of the record in this case and as such shall have the full force and effect of an order of the Court.

7. Pursuant to Rule 23.05 of the Tennessee Rules of Civil Procedure, the Court hereby grants final approval of the

Agreement and the Settlement set forth in the Agreement and finds that it is fair, adequate, and reasonable to the members of the Settlement Class.

8. The objections that were filed, whether timely or not, have been considered and are all overruled.

9. Accordingly, the Court directs that the Settlement be consummated in accordance with the terms and conditions of the Agreement.

10. Plaintiffs and all members of the Settlement Class are barred and permanently enjoined from prosecuting (in any forum) against Shell Oil Company and/or Hoechst Celanese Corporation any and all claims, demands, causes of action of every kind and nature, obligations, damages, losses, and costs, whether known or unknown, actual or potential, suspected or unsuspected, contingent or fixed, either arising out of or relating to any of the facts, transactions, actions, or conduct alleged in this action, or that were or could have been asserted or sought in the action, other than any past, present, or future claim for bodily injury (including wrongful death) and associated emotional distress and mental anguish.

11. The Complaint as amended, and all claims and causes of action asserted therein are dismissed with prejudice and costs, as provided in the Agreement, to be paid from the settlement fund.

12. The Application is hereby granted. In accordance with the Funding Agreement referred to in the Agreement,

the defendants shall pay Plaintiffs' Class Counsel, as attorneys' fees and expenses, the sum of $45 million plus interest at the rate applicable to federal court judgments entered on July 31, 1995, for the period from July 31, 1995, until the earlier of July 31, 1996, or when paid. In addition, in accordance with Section 25.1 of the Agreement and with the Funding Agreement referred to in the Agreement, the defendants shall pay the sum of $3,000.00 to each single Representative Plaintiff or Representative Plaintiff married couple.

13. In the event that the Settlement does not become Final (as more fully defined in the Agreement) in accordance with the terms of the Agreement, then this Order and the Final Judgment and Decree being entered herewith shall be rendered null and void and be vacated and the Agreement shall be rendered null and void in accordance with the provisions thereof.

14. Without affecting the finality of this Order or of the Final Judgment being entered herewith, the Court shall retain continuing jurisdiction over the Action and the settling Parties (as more fully defined in the Agreement), including all members of the Settlement Class; the administration and enforcement of the Settlement; and the benefits to the Settlement Class, including for such purposes as supervising the implementation, enforcement, construction, and interpretation of the Agreement.

15. Any disputes or controversies arising with respect to the interpretation, enforcement, or implementation of the Agreement shall be presented by motion to the Court.

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16. Pursuant to Rule 54.02 of the Tennessee Rules of Civil Procedure, the Court hereby directs the entry of this judgment based upon the Court's finding that there is no just reason for delay notwithstanding the Court's retention of jurisdiction to oversee implementation and enforcement of the Agreement and its continuing jurisdiction to provide for supplemental notice (and related proceedings) to potential members of the Settlement Class as to whom the Court previously received requests for exclusion from the Settlement Class.

s/ W. Michael Maloan
CHANCELLOR

ENTERED: November 17, 1995

No. 03-1543

In The
Supreme Court of the United States

RICHARD R. RICHARD, JR.,
on behalf of himself and all others similarly situated,

Petitioners,

v.

HOECHST CELANESE CHEMICAL GROUP, INC., SHELL OIL COMPANY d/b/a SHELL CHEMICAL COMPANY, HOECHST CELANESE CORPORATION, and E.I. DuPONT de NEMOURS AND COMPANY,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

SHELL OIL COMPANY'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Fifth Circuit properly affirmed the dismissal of Petitioner's due process claim for lack of subject matter jurisdiction when ruling in his favor would have required the district court to review the final decisions of two state courts and determine their judgments were wrong in violation of the *Rooker-Feldman* doctrine.

2. Whether the Fifth Circuit properly affirmed the dismissal of Petitioner's civil RICO action for failure to state a claim upon which relief can be granted.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioners have identified all parties in this proceeding.

Pursuant to Supreme Court Rule 29.6, Respondent Shell Oil Company advises the Court that Shell Oil Company is a wholly-owned subsidiary of Shell Petroleum, Inc., a Delaware corporation. Shell Petroleum, Inc. is directly or indirectly owned 60% by Royal Dutch Petroleum Company and 40% by The "Shell" Transport and Trading Company, p.l.c.

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EXPLANATION OF RECORD CITES

"Pet." refers to the Petition for Writ of Certiorari.

"Pet. App. _____" refers to the Appendix attached to the Petition for Writ of Certiorari.

"Shell App. _____" refers to the Appendix attached to Respondent Shell Oil Company's Brief in Opposition to Writ of Certiorari.

"_____ R. ____" refers to the Record on Appeal filed with the United States Court of Appeals for the Fifth Circuit cited by specific volume and page number.

"Supp. R. ____" refers to the Supplemental Record on Appeal filed with the United States Court of Appeals for the Fifth Circuit cited by specific docket and exhibit number.

SHELL OIL COMPANY'S BRIEF IN OPPOSITION

This case represents yet another failed attempt to make a federal case out of leaking plumbing. In *Summit Properties, Inc. v. Hoechst Celanese Corp.*, 214 F.3d 556 (5th Cir. 2000), *cert. denied*, 531 U.S. 1132 (2001), the Fifth Circuit rejected an effort to turn "garden variety" state law products liability claims into a federal racketeering case, and this Court denied the petition for writ of certiorari. The Fifth Circuit held that a plaintiff similarly situated to Petitioner could not meet RICO's proximate cause requirement because he did not personally receive or rely upon the alleged misrepresentations made the basis of his mail and wire fraud claims.

Petitioner argues that a different result should obtain here because he says he sought equitable relief under RICO in the form of disgorgement of profits rather than damages. He did not. Petitioner also claims that he was entitled to seek equitable disgorgement in a RICO civil action even though he too could not meet the detrimental reliance requirement for a damage claim. He cannot. The district court rejected Petitioner's RICO contentions, and the Fifth Circuit affirmed. They were correct.

However, Petitioner's case *was* in fact different from *Summit* in one significant way: regardless of the merits of his RICO arguments, Petitioner's claims were precluded by the 1995 final judgments of Tennessee (*Cox*) and Alabama (*Spencer*) courts approving two nationwide class action settlements.[1] Anticipating this, Petitioner also

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[1] Final Judgment in *Cox v. Shell Oil Co.*, Case No. 18,844 (Chancery Ct., Obion Cty., Tenn. Nov. 17, 1995) (Shell App. 30-34) and Final Order Approving the Class Action Settlement, Attorneys' Fees and

(Continued on following page)

sought to set aside the *Cox* and *Spencer* settlements on the ground that absent class members were not afforded adequate notice or adequate representation. However, Petitioner's efforts to have the federal district court void the final judgments of the Tennessee and Alabama courts ran afoul of the *Rooker-Feldman* doctrine.[2]

Contrary to Petitioner's contentions, the courts below followed well-established precedents in dismissing Petitioner's RICO claims for failure to state a claim upon which relief could be granted and dismissing Petitioner's collateral attacks on the *Cox* and *Spencer* judgments for lack of subject matter jurisdiction under the *Rooker-Feldman* doctrine. As a result, this case does not require this Court's review.

Expenses, and Awards to Representative Plaintiffs in *Cox* (filed Nov. 17, 1995) (Shell App. 1-29) (collectively "*Cox*"); *Spencer v. Shell Oil Co.*, Case No. CV-94-047 (Circuit Ct., Greene Cty., Ala. Nov. 17, 1995) (3 R. 852-857) ("*Spencer*"). Contrary to Petitioner's claim, Respondents did not cause these cases to be brought. (Pet. 5-6).

[2] Under the *Rooker-Feldman* doctrine, a federal district court lacks jurisdiction to review, modify, nullify, or otherwise engage in appellate-style review of a state court's judgment. Rather, review of any constitutional challenges to a state court's judgment must be through the state's appellate system and ultimately in the United States Supreme Court. *See* § I.A. *infra*. The doctrine derives from the Supreme Court's decisions in *Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 416 (1923), and *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 476-82 (1983).

STATEMENT OF THE CASE

A. Factual Background

Petitioner[3] is the owner of a used mobile home with polybutylene ("PB") plumbing. PB plumbing systems are comprised of PB pipe and various "fittings" that join sections of the pipe. These fittings are made from different raw materials and different designs. Respondents did not manufacture or sell PB plumbing systems or the component parts of those systems. Rather, Shell manufactured PB resin that was sold to third parties who extruded it into PB plumbing pipes, and Celanese and DuPont manufactured and sold acetal resins named Celcon and Delrin, respectively, which were molded into the plastic fittings used to join the pipes together.[4]

In 1995 Shell and Celanese entered into a settlement with a nationwide class of owners of structures with PB plumbing. The *Cox* settlement, approved by a state court in Tennessee, obligates Shell and Celanese to provide $950 million to pay for replumbs[5] for claimants with a qualifying plumbing leak and for the repair of physical damage to property resulting from a leak. (Supp. R. Docket No. 185, Ex. 84 at 10, § 4.5, and Third Amendment at 3, § 2.2). DuPont entered into a separate settlement with a similar

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[3] Because Petitioner's Statement of the Case is simply a self-serving recitation of his allegations, replete with misstatements and mischaracterizations of fact and law, Shell respectfully presents its own Statement of the Case.

[4] Petitioner did not sue any of the manufacturers of the pipe and fittings installed in his mobile home, the manufacturer of his mobile home, or the previous owner who Petitioner claims misrepresented to him the condition and quality of the plumbing in his mobile home.

[5] A "replumb" is the replacement of a class member's leaking PB plumbing system with a new copper or CPVC plumbing system.

nationwide class of homeowners with PB plumbing. Its *Spencer* settlement, approved by a court in Alabama, obligates DuPont to contribute further sums toward the replacement of PB plumbing systems and the repair of associated property damage.

By purchasing a mobile home containing PB plumbing, Petitioner became a member of the *Cox* and *Spencer* nationwide settlement classes. He did not timely exercise his right to opt out. Assuming he otherwise met the eligibility requirements of the settlement, he was entitled to have the PB plumbing in his mobile home replaced free of charge with a copper or CPVC plumbing system and any water damage to his home repaired. Petitioner does not allege any circumstances peculiar to him that would make this anything less than a complete remedy for the harm he claims to have sustained. Nevertheless, Petitioner chose to forego that full and effective relief. Instead he sought to set aside the final judgments of the Tennessee and Alabama courts approving the *Cox* and *Spencer* settlements and litigate on behalf of a new putative class the product liability claims settled in those prior class actions.

B. Procedural Background

In his Original Class Action Complaint filed in January 2000, Petitioner alleged that Respondents were liable for the damages he and the class sustained as a result of leaks in their PB plumbing systems on theories of conspiracy, strict liability, negligence, and breach of implied warranties. In addition, he alleged that the Tennessee and Alabama judgments approving the *Cox* and *Spencer* nationwide class action settlements should not be given full faith and credit and thereby preclude his lawsuit

because those courts allegedly failed to provide absent class members with due process. (1 R. 1-25).

Petitioner's Original Class Action Complaint was insufficient to invoke the district court's subject matter jurisdiction. His claims for relief arose strictly under state law, and there was no diversity of citizenship. His due process attack on the *Cox* and *Spencer* settlements did not create federal subject matter jurisdiction because of the well-pleaded complaint rule[6] and the *Rooker-Feldman* doctrine. In response to Respondents' motions to dismiss, Petitioner tried to manufacture federal subject matter jurisdiction by amending his complaint to add Lanham Act and RICO claims. (Shell App. 52-66). He also transformed his due process challenge to the *Cox* and *Spencer* judgments into a "claim for relief" and sought an injunction barring Respondents' use of the *Cox* and *Spencer* judgments to prevent his recovering damages attributable to his leaking plumbing. (Shell App. 66-74).

Petitioner's Lanham Act claim was patently frivolous. Section 43(a) of the Lanham Act addresses only *competitive* injuries and a consumer such as Petitioner lacks standing to assert a claim. *E.g., Seven-Up Co. v. Coca-Cola Co.*, 86 F.3d 1379, 1383 (5th Cir. 1996). Petitioner eventually recognized the futility of his Lanham Act claim and "withdrew" it. (3 R. 979).

Petitioner's RICO claim was foreclosed by the Fifth Circuit's decision in *Summit*, in which the Fifth Circuit

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[6] Under the well-pleaded complaint rule, a plaintiff cannot establish federal question jurisdiction by pleading a federal ground in avoidance of an anticipated defense. *See* footnote 12 *infra*. Although not relied on by the Fifth Circuit, the well-pleaded complaint rule provided an alternative basis for affirming the dismissal of Petitioner's due process claim.

held that the owner of a structure with PB plumbing could not maintain a RICO claim against these same Respondents unless he could show he personally received and relied upon the alleged misrepresentations made the basis of his RICO mail and wire fraud claims. To avoid the conclusive effect of *Summit*, Petitioner first argued that his case was different because, unlike the *Summit* plaintiffs, he had pled reliance. (3 R. 990). However, when the district court ordered him to file a RICO Case Statement detailing the factual bases for his RICO claim, he was forced to admit that he too never personally received, heard, saw, or relied on any alleged misrepresentation by any of the Respondents, which brought his case squarely within the rule of *Summit*. (2 R. 664-65).

Faced with this dilemma, Petitioner then sought refuge in the narrow "target exception" to the civil RICO requirement of detrimental reliance. (3 R. 991). However, this argument was foreclosed not only by *Summit*, but also by the Fifth Circuit's subsequent decision in *Proctor & Gamble Co. v. Amway*, 242 F.3d 539 (5th Cir.), *cert. denied*, 534 U.S. 945 (2001). In both *Summit* and *Proctor & Gamble* the Fifth Circuit made clear that RICO's "narrow target exception" applies only to injured competitors who can establish that their customers were lured away because they relied on a defendant's fraudulent misrepresentations. *See Proctor & Gamble*, 242 F.3d at 564-65. Consequently, the district court rejected Petitioner's "target exception" argument. (Pet. App. 46-48). In his Fifth Circuit brief Petitioner finally admitted that *Summit* prevented him from obtaining a RICO damage recovery.

In a last-ditch effort to salvage a RICO claim, Petitioner raised orally at a hearing in the district court a new argument – that under the Seventh Circuit's decision in

National Org. for Women, Inc. v. Scheidler ("*NOW*"), 267 F.3d 687 (7th Cir. 2001), *rev'd on other grounds*, 537 U.S. 393 (2003), he could maintain a RICO claim for *equitable relief* in the form of disgorgement of profits. (6 R. 16-18). After receiving briefs on Petitioner's new argument, the district court rejected it for two reasons. First, the district court held that "Plaintiff's foundational claim that equitable relief is permissible under RICO is tenuous at best," since "[t]o the extent that courts in the Fifth Circuit have considered equitable remedies under RICO, the idea has been dismissed." (Pet. App. 51-52). Second, the district court held that the *NOW* case did not change *Summit*'s requirement that a civil RICO plaintiff must demonstrate direct reliance on a fraudulent misrepresentation, which Petitioner could not do. (Pet. App. 52). As a result, the district court held that Petitioner's RICO allegations failed to state a claim upon which relief could be granted. (Pet. App. 52).

In addition, the district court held that under the *Rooker-Feldman* doctrine it lacked jurisdiction over Petitioner's due process challenge to the *Cox* and *Spencer* judgments. (Pet. App. 33-35). Having dismissed Petitioner's purported federal law claims, the district court then dismissed without prejudice his pending state law claims. (4 R. 1312).

In December 2003, the Fifth Circuit affirmed the district court's dismissal of Petitioner's claims. *Richard v. Hoechst Celanese Chem. Group, Inc.*, 355 F.3d 345 (5th Cir. 2003) (Pet. App. 1-18). Although the Fifth Circuit could have reached that result on any number of grounds, ultimately it chose two. First, the court affirmed the dismissal of Petitioner's due process challenge to the *Cox* and *Spencer* judgments based on the district court's lack of

subject matter jurisdiction under *Rooker-Feldman*. Second, the Fifth Circuit held that the district court had properly dismissed Petitioner's RICO claim for failure to state a claim because it found the remedy Petitioner claimed to be seeking – equitable disgorgement – was not available under the circumstances of this case. (Pet. App. 18).

REASONS THE PETITION SHOULD BE DENIED

I. The Fifth Circuit Correctly Held That Under the *Rooker-Feldman* Doctrine the District Court Lacked Subject Matter Jurisdiction Over Petitioner's Due Process Claim

The Fifth Circuit correctly found that the *Rooker-Feldman* doctrine deprived the district court of subject matter jurisdiction over Petitioner's due process claim.

A. The *Rooker-Feldman* Doctrine Prohibited the District Court From Reviewing the *Cox* and *Spencer* Final Judgments

The *Rooker-Feldman* doctrine derives from this Court's holdings in *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923), and *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983). In *Rooker*, this Court held that federal district courts cannot exercise "appellate jurisdiction" over constitutional questions decided by state courts, even if the state court judgment was in error. *Rooker*, 263 U.S. at 415. In such instances, the appropriate remedy is through the state appellate system. *Id.* Recourse in the federal courts is limited strictly to seeking review in the United States Supreme Court since all lower federal courts lack subject matter jurisdiction to review or modify state court judgments. *Id.* at 416. In *Feldman*, this Court

explained that the lower federal courts also lack jurisdiction to review final judgments of state courts when constitutional claims are "inextricably intertwined" with the challenged state court judgment. *Feldman*, 460 U.S. at 483 n.16.

Here Petitioner sought to have the federal district court decide issues "inextricably intertwined" with the final judgment of the Tennessee court approving the *Cox* settlement. He argued that the Tennessee judgment was not entitled to full faith and credit because absent class members were not afforded the due process – adequate notice and adequate representation – that *Phillips Petroleum v. Shutts*, 472 U.S. 797, 811-12 (1985), requires. (Pet. 11-12).

However, in approving the *Cox* settlement, the Tennessee court expressly addressed the *Shutts* due process requirements – and, indeed, many of Petitioner's specific complaints. For example, in his Second Amended Complaint Petitioner complained about the adequacy of class counsel's representation. (Shell App. 71-74, ¶¶ 123-128). The *Cox* court, however, found that "[t]here is no factual basis for the asserted objection that there is any conflict of interest with respect to the *Cox* Class Counsel." (Shell App. 23, ¶ 64). The *Cox* court further found that "[t]he *Cox* Class Counsel maintained the highest standards of professionalism and advocacy in protecting and promoting the interests of the Class throughout the prosecution and settlement of this case." (Shell App. 23, ¶ 65). Finally, the *Cox* court found that the settlement was "in all respects fair, reasonable, and adequate and in the best interests of the Settlement Class." (Shell App. 18, ¶ 38; Shell App. 27, ¶ 7).

In addition, Petitioner alleged that the notice provided to absent class members in *Cox* was constitutionally inadequate. (Shell App. 68, ¶ 113; Shell App. 69, ¶ 117; Shell App. 74, ¶ 129). However, the *Cox* court's Final Order also reveals the careful attention it paid to the issue of notice to absent class members. After reviewing the details of the multi-faceted, multi-media notice campaign and considering the testimony of experienced class notice experts, the *Cox* court ruled that the notice campaign "as designed and implemented, met and exceeded the requirements of the United States Supreme Court, Tennessee's Rule 23, due process and the Constitution, as construed in [*Shutts*]." (Shell App. 17, ¶ 32). The *Cox* court further found that "the notice program is one of the most comprehensive class notice campaigns ever undertaken," that "all reasonable efforts have been made to reach affected consumers," and that "the best notice practicable under the circumstances has been provided to the settlement class."[7] (Shell App. 6; Shell App. 17, ¶ 33).

Moreover, the *Cox* court found that "[t]he notice provided to the Settlement Class was neither misleading nor defective." (Shell App. 21, ¶ 50). Rather, the *Cox* court found that the notice "fully and accurately informed Settlement Class members of all material elements of the proposed Settlement" and complied with all applicable legal standards. (Shell App. 3; Shell App. 17, ¶¶ 32, 33).

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[7] In reaching its conclusion the *Cox* court noted that the *Cox* settlement provided for not only an initial notice campaign, but also re-noticing the class every three years thereafter until 2009. (Shell App. 11, ¶ 12(e)). The *Cox* settlement further provided an opportunity for subsequent purchasers of homes with PB plumbing – such as Petitioner – to opt out of the settlement in response to the subsequent notice. (Supp. R. Docket No. 185, Ex. 84 at § 10.2).

Petitioner disputes all of these material findings of the Tennessee court and sought to have the federal district court declare that the *Cox* court was wrong in its conclusion that the due process requirements of *Shutts* were met. However, as the Fifth Circuit held, Petitioner's claims collided head-first with the *Rooker-Feldman* doctrine, which bars exactly this type of appellate review of state court judgments:

> [Petitioner's] allegations indisputably denounce the express findings of the *Cox* state court. . . . The *Feldman* holding appears to squarely fit [Petitioner's] situation. The *Cox* court's findings that allow for certification are "inextricably intertwined" with [Petitioner's] constitutional challenge to the state's compliance with due process requirements. A federal court cannot examine the due process deficiencies in *Cox* without disturbing the underlying judgment.

(Pet. App. 10-11). In short, the Fifth Circuit's holding that the federal district court lacked subject matter jurisdiction over Petitioner's due process challenge to the *Cox* final judgment is an unexceptional application of *Rooker-Feldman*.[8] Accepting the formulation of Justice Marshall

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[8] Although it could have stopped there, the Fifth Circuit went on to find that Petitioner had failed to state a claim under § 1983. (Pet. App. 11-15). Respondents Hoechst Celanese and DuPont have fully addressed this issue in their Briefs in Opposition. Shell would add only that Petitioner never pleaded the § 1983 claim he hypothesizes. (Pet. 7). Plaintiff's Second Amended Complaint does not reference § 1983 at all. It contains no allegations of any facts supporting state action under either the "innocent agent" or "judicial malfeasance (bribery)" theory. To the contrary, Petitioner based his due process claim on, first, an obscure "door closing" theory applicable only to South Carolina state courts, and, second, supposed deficiencies in the *Cox* court's findings with respect to due process. (Shell App. 66-74, ¶¶ 105-129).

in *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 25 (1987), the circuit courts universally hold that when the federal district court can provide relief only by determining that the state court was wrong, then plaintiff's case is, in effect, an appeal of the state court decision prohibited by the *Rooker-Feldman* doctrine. *See, e.g.*, *Peterson Novelties, Inc. v. City of Berkley*, 305 F.3d 386, 393 (6th Cir. 2002); *Ace Const. v. City of St. Louis*, 263 F.3d 831, 833 (8th Cir. 2001); *Doe & Assoc. Law Offices v. Napolitano*, 252 F.3d 1026, 1030 (9th Cir. 2001).

B. There Is No Exception to the *Rooker-Feldman* Doctrine For Absent Class Members Who Collaterally Attack State Court Class Action Judgments

Petitioner offers a grab bag of arguments about how the Fifth Circuit's application of *Rooker-Feldman* supposedly conflicts with other circuits. Taken together, these arguments amount to a claim that there is an exception to *Rooker-Feldman* for absent class members who collaterally attack state court class judgments. In fact, there is no such exception, and no circuit court has so held. As Shell will demonstrate below, Petitioner's claim of a circuit conflict is based not on class action cases, but solely on a motley collection of divorce cases – and a misreading of those cases to boot.

1. There Is No Procedural Due Process Exception to the *Rooker-Feldman* Doctrine

Petitioner argues for a procedural due process exception to the *Rooker-Feldman* doctrine in which every absent class member is entitled to endlessly relitigate in federal

district court the rendering state court's findings with respect to the *Shutts* due process requirements. (Pet. 11-13). Notably, Petitioner cannot – and does not – cite any authority endorsing such an extreme proposition. *Rooker-Feldman* applies with equal force to both the procedural and substantive findings of state courts. The fact that a plaintiff affirmatively alleges he was not afforded procedural due process in a state court class action makes no difference in the *Rooker-Feldman* analysis.

The authority Petitioner cites for this argument is the decision in *Catz v. Chalker*, 142 F.3d 279 (6th Cir. 1998), one of at least five different lawsuits between parties to a divorce. Petitioner claims that in *Catz*, the "Ninth Circuit"[9] distinguished between "plaintiffs seeking to set aside state judgments because of their substance from those challenging the state court's procedure." (Pet. 15). According to Petitioner, "when a plaintiff challenges procedure rather than merits, his claim is . . . not precluded by *Rooker-Feldman*." (Pet. 15-16). Petitioner's reliance on *Catz*, however, is utterly misguided.

In *Catz* the Sixth Circuit held simply that certain due process allegations were not "inextricably intertwined" with the merits of a state court divorce decree such that *Rooker-Feldman* did not apply. 142 F.3d at 294-95. *Catz* bears no resemblance to the situation here. In *Cox* the Tennessee court made specific findings pertaining to the adequacy of notice and the adequacy of representation. Indeed, Tennessee Rule of Civil Procedure 23 required that it do so before approving the class settlement. Petitioner seeks to relitigate those same findings. Here then is the classic situation where "federal relief

[9] *Catz* is actually a Sixth Circuit decision.

can only be predicated upon a conviction that the state court was wrong," which even *Catz* recognized would be barred by the *Rooker-Feldman* doctrine. *Id.*

In fact, contrary to Petitioner's claim, the circuits uniformly reject the notion of a procedural due process exception to *Rooker-Feldman* in a class action context. For example, in *Kamilewicz v. Bank of Boston Corp.*, 92 F.3d 506 (7th Cir. 1996), *cert. denied*, 520 U.S. 1204 (1997), the Seventh Circuit rejected plaintiffs' "far-reaching proposed exception to the *Rooker-Feldman* doctrine" when urged to conclude that it could "overturn the decision of the Alabama court insofar as it involved a determination that procedural due process was complied with." *Kamilewicz*, 92 F.3d at 510. Similarly, in *Snider v. City of Excelsior Springs*, 154 F.3d 809, 812 (8th Cir. 1998), the Eighth Circuit reiterated: "As we have held before in a case in which the plaintiffs alleged insufficient notice in a state court action, there is no procedural due process exception to the *Rooker-Feldman* rule."

The Fifth Circuit has similarly refused to recognize an exception to *Rooker-Feldman* for procedural due process claims. In *Liedtke v. State Bar of Texas*, 18 F.3d 315 (5th Cir.), *cert. denied*, 513 U.S. 906 (1994), an attorney sued in federal court to prevent the enforcement of a state court judgment disbarring him, claiming he had not been afforded due process or a full and fair opportunity to be heard. The court, however, applied *Rooker-Feldman* and affirmed dismissal of the attorney's action, noting that "the casting of a complaint in the form of a civil rights action cannot circumvent this rule." *Id.* at 317-18.[10]

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[10] Petitioner also claims the Fifth Circuit's decision below conflicts with cases like *Simes v. Huckabee*, 354 F.3d 823 (8th Cir. 2003), that

(Continued on following page)

2. There Is No Exception to the *Rooker-Feldman* Doctrine For Absent Class Members Who Were Not Named Parties to a State Court Judgment

Petitioner also contends that *Rooker-Feldman* cannot bar his due process attack on the *Cox* and *Spencer* judgments because he was not a "party" to those cases. (Pet. 15-17). In effect, he argues there is an exception to *Rooker-Feldman* for absent class members who are not named parties to the lawsuit. Under this theory absent class members would always litigate anew their various due process challenges to state court class action judgments. Petitioner's argument is wrong both legally and conceptually because it ignores the fundamental notion that a class action is a representative lawsuit.

For example, in *Snider*, the Eighth Circuit specifically rejected the argument that *Rooker-Feldman* did not apply to absent members of a state court-approved class because they were not "parties." The court stated that "to determine that the plaintiffs here were not 'parties' in the state court action would require us to hold that the state court wrongly certified the class," which is not an issue a federal

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refuse to apply *Rooker-Feldman* where the plaintiff has not had a "reasonable opportunity" to raise his federal claims in state court. (Pet. 16). For example, in *Simes* plaintiff attempted to raise his federal claims in state court, but the state court declined to consider them. *Id.* at 828-30. In other of the "reasonable opportunity" cases cited in *Simes*, the state court procedures themselves did not allow the plaintiffs to present their federal claims. All of these cases are inapposite here. In *Cox*, the Tennessee state court afforded absent class members the opportunity to object to the settlement and specifically considered objections to the adequacy of the notice and adequacy of representation similar to those that Petitioner urges. (Shell App. 19-23, ¶¶ 41, 42, 46, 47, 64, 66). Thus in *Cox* there was no lack of "reasonable opportunity" to contest these due process issues.

district court has jurisdiction to decide under the *Rooker-Feldman* doctrine. *Snider*, 154 F.3d at 812.

Other courts have also ruled that *Rooker-Feldman* precludes absent class members from obtaining review of final state court judgments in federal district court. In *Kamilewicz*, absent class members sued the parties to a nationwide class settlement and class counsel alleging, like Petitioner here, that the state court judgment approving the settlement was null and void because of lack of due process. *Kamilewicz*, 92 F.3d at 509. Notwithstanding that the plaintiff class members were not named parties to the original state court case, the Seventh Circuit held *Rooker-Feldman* barred the district court from hearing their due process claims. *Id.* at 509-12. Similarly, in *In re General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 134 F.3d 133 (3rd Cir. 1998), the Third Circuit held that under *Rooker-Feldman* absent class members could not sue in federal court to enjoin a Louisiana state court judgment approving a nationwide class settlement. *GMC*, 134 F.3d at 143.[11]

In fact, Petitioner's entire argument runs counter to the very representational nature of a class action. The Supreme Court long ago noted that a class action, or a "representative" suit, is an exception to the rule that one cannot be bound by a judgment *in personam* unless one was made fully a party in the traditional sense. *Shutts*, 472 U.S. at 808 (citing *Hansberry v. Lee*, 311 U.S. 32, 40-41 (1940)); *see also* 7B Wright, Miller, & Kane, *Federal*

[11] Petitioner's citation to *Allen v. Allen*, 48 F.3d 259 (7th Cir. 1995), a child custody case, is irrelevant because *Allen* does not involve or address a court's ability to bind absent class members to a *class action* judgment.

Practice and Procedure § 1789 at 238 (2d ed. 1986). There is no requirement that a class member must be a named party in a class action to be bound by the resulting judgment. The whole point of the *Shutts* minimum due process requirements – as set forth by this Court – is to establish when a class member will be bound *even though he does not appear and is not a named party*.

3. The Theory of Injury By an Adverse Party Does Not Apply Here

In a final twist, Petitioner argues that *Rooker-Feldman* does not apply when a plaintiff alleges his injury was caused by an adverse party. (Pet. 13-14). Petitioner contends that because he alleges damage to his mobile home caused by PB plumbing, "*Rooker-Feldman* does not bar jurisdiction, as it would if the legal injury were caused by the state judgment itself." (Pet. 14). Petitioner's characterization of his claim, however, is demonstrably false, and his reliance on *Noel v. Hall*, 341 F.3d 1148 (9th Cir. 2003), is misplaced.

First, Petitioner's claim that he is "not seeking to invalidate the state court judgment" (Pet. 15) is disingenuous at best. Petitioner's Second Amended Complaint alleged that the *Cox* and *Spencer* judgments were void and sought an injunction barring the use of the *Cox* and *Spencer* judgments to preclude the product liability claims of Petitioner and the nationwide class he purported to represent. (Shell App. 69, ¶ 118; Shell App. 74, ¶ 129). His pleading included an eight-page attack on the validity of the *Cox* and *Spencer* judgments. (Shell App. 66-74). As the Fifth Circuit found, his "allegations indisputably denounce the express findings of the *Cox* state court." (Pet. App. 10).

Even the *Noel* court would regard such claims as barred by *Rooker-Feldman*. In that case the Ninth Circuit summarized this Court's decisions in *Rooker* and *Feldman* and its own precedents as follows:

> It is a forbidden *de facto* appeal under *Rooker-Feldman* when the plaintiff in federal district court complains of a legal wrong allegedly committed by the state court, and seeks relief from the judgment of that court.

341 F.3d at 1163. The *Noel* court subsequently reiterated,

> If a federal plaintiff asserts as a legal wrong an allegedly erroneous decision by a state court, and seeks relief from a state court judgment based on that decision, *Rooker-Feldman* bars subject matter jurisdiction in federal district court.

Id. at 1164. That is of course precisely the situation here.

Second, when the *Noel* court contrasted the situation where the plaintiff complains of an injury caused by an adverse party, it was addressing an entirely different circumstance. In *Noel*, the federal district court mistakenly invoked *Rooker-Feldman* to dismiss a fiduciary duty claim simply because an identical claim was pending between the same parties in a simultaneous state court action. *Noel*, 341 F.3d at 1165. On appeal, the Ninth Circuit found that the district court had erred and *Rooker-Feldman* could not apply because there was *no state court judgment whatsoever* relating to the fiduciary duty claim – in fact, the state court litigation was still pending:

> We have never held that when there are simultaneous suits in state and federal court, in which related . . . claims are being litigated, the federal suit must be dismissed under *Rooker Feldman*. . . . The Supreme Court has repeatedly stated that simultaneous state and federal

> litigation of overlapping, and even identical, issues is an important feature of our federal system. . . . The pending suit in [state court] therefore does not prevent [plaintiff] from pursuing his fiduciary duty claim simultaneously in his federal court suit, and we reverse the district court's dismissal of that claim.

Id.

In summary, Petitioner has failed to identify any exception to the *Rooker-Feldman* doctrine that would alter the Fifth Circuit's conclusion that the federal district court lacked subject matter jurisdiction over Petitioner's due process claim.[12]

II. The Fifth Circuit Correctly Affirmed the Dismissal of Petitioner's RICO Claim For Failure To State a Claim on Which Relief Can Be Granted

Petitioner also seeks review of the Fifth Circuit's decision upholding the dismissal of his RICO claim. Petitioner claims this issue is worthy of this Court's review because, in his view, the Fifth Circuit construed too narrowly the disgorgement remedy of 18 U.S.C. § 1964(a).

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[12] Moreover, even if *Rooker-Feldman* were not dispositive of Petitioner's due process claim, the well-pleaded complaint rule provided an independent basis for the district court to find that the claim was barred. As Shell demonstrated in the courts below, Petitioner's due process attack on the judgment of the Tennessee court – asserting that the *Cox* judgment should not be enforced for due process reasons – merely anticipated the full faith and credit defense that Respondents were likely to raise. Under the well-pleaded complaint rule, matters raised in avoidance or anticipation of a defense do not present a federal question and cannot establish federal subject matter jurisdiction. *E.g.*, *Franchise Tax Bd. v. Construction Laborers Vacation Trust*, 463 U.S. 1, 10 (1983).

However, granting *certiorari* to decide this issue would be largely futile, as there were numerous other grounds on which Petitioner's RICO claim should have been dismissed. Thus this Court would likely never even reach the issue of the proper scope of the disgorgement remedy.[13]

Among the numerous flaws in Petitioner's RICO claims were the following:

- As the Fifth Circuit previously held in *Summit*, Petitioner could not sue for damages for mail or wire fraud because, by his own admission, he did not directly receive or rely upon Respondents' allegedly fraudulent statements;
- While Petitioner claimed he could nevertheless sue for equitable relief, he never sought to amend his complaint to allege a RICO claim for equitable relief;
- Even if he had pleaded a claim for equitable relief, that claim would still be barred by his admitted inability to meet the detrimental reliance requirement for a civil RICO fraud action;

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[13] It is well established that this Court "reviews judgments, not opinions." *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984). The Court has repeatedly stated that the prevailing party may "defend its judgment on any ground properly raised below whether or not that ground was relied upon, rejected, or even considered by the District Court or the Court of Appeals." *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 38 (1989) (quoting *Washington v. Yakima Indian Nation*, 439 U.S. 463, 479 n.20 (1979)); *Bennett v. Spear*, 520 U.S. 154, 166 (1997) ("a Respondent is entitled, however, to defend the judgment on any ground supported by the record"); *Whitley v. Albers*, 475 U.S. 312, 326 (1986) (any ground properly raised below may be urged as a basis for Supreme Court's affirmance of Court of Appeals' decision). Therefore, even if this Court had some question about the Fifth Circuit's reasoning, it could not reverse the judgment of the Court of Appeals until it considered all of the grounds urged below and found that the judgment was not sustainable on any basis.

- In any event, the weight of authority holds that RICO does not authorize private plaintiffs to sue for equitable relief;
- The equitable relief Petitioner suggests but never pleaded – disgorgement – is a remedy available only to the Government;
- And, finally, the point on which the Fifth Circuit chose to rest its decision: disgorgement is available only to "prevent and restrain" ongoing or future violations and not, as here, to compensate for past injuries. (Pet. App. 16-17).

Any of the foregoing would provide an independent basis for affirming the dismissal of Petitioner's RICO claims.

A. The Equitable Remedy of Disgorgement Is Not Available to Petitioner

As discussed *infra* (§§ II. C. and D), equitable remedies are not available to private RICO plaintiffs, and Petitioner did not sue for equitable relief. But even if he had, disgorgement is a remedy that courts have allowed under RICO only in favor of the Government and, even in the case of the Government, it is allowed only under very limited circumstances not applicable here.

Both courts and commentators have uniformly recognized that "disgorgement is an equitable remedy available to the *government* in a civil RICO action" in appropriate cases. Smith and Reed, *Civil RICO*, § 10.02 (Matthew Bender 2000) (emphasis added). No case has ever held that disgorgement is available to a private civil RICO plaintiff and, noticeably, Petitioner cites none.

In fact, the Second Circuit – the only court of appeals to consider whether disgorgement is an appropriate civil RICO remedy – has restricted even the Government's use

of the remedy solely to situations aimed at preventing *future* RICO violations. In the seminal case of *United States v. Carson*, 52 F.3d 1173 (2d Cir. 1995), *cert. denied*, 516 U.S. 1122 (1996), the court rejected the idea that § 1964(a) authorized "disgorgement of gains ill-gotten long in the past." 52 F.3d at 1181. The court reasoned that § 1964(a) is "forward looking, and calculated to prevent RICO violations in the future." *Id.* Therefore, the court held, the only disgorgements available to the Government were those "designed to 'prevent and restrain' *future* conduct rather than to punish *past* conduct." *Id.* at 1182 (emphasis in original).[14]

As Petitioner conceded in his Second Amended Complaint, PB plumbing systems are no longer being sold. (Shell App. 39, ¶ 14). Thus, the Fifth Circuit reasoned, consistent with *Carson*, that even if disgorgement were a remedy available to Petitioner, disgorgement would not be available to Petitioner because he did not seek disgorgement to prevent or restrain ongoing or future injury, but rather solely for the purpose of compensation for past injuries:

> Even if equitable relief were available to a private party, disgorgement is not a proper remedy given the circumstances of this case. . . . We agree with the Second Circuit's reasoning in *Carson*. Section 1964(a) establishes that equitable remedies are available only to prevent ongoing and future conduct. Here, [Petitioner] does not seek disgorgement to "prevent and restrain" the [Respondents] from producing PB plumbing systems. In fact, in his Second Amended Complaint,

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[14] The Second Circuit has repeatedly reaffirmed its holding in *Carson*. *See United States v. Sasso*, 215 F.3d 283, 290-91 (2d Cir. 2000).

> [he] concedes that the [Respondents] no longer market the plumbing systems.

(Pet. App. 17).

Consequently, the Fifth Circuit properly affirmed the dismissal of Petitioner's RICO claim. However, *even if* the Fifth Circuit too narrowly construed the disgorgement remedy, Petitioner's RICO claim would fail for several other reasons.

B. Petitioner's Inability To Satisfy the Proximate Cause Requirement of *Holmes* Dooms His RICO Claim No Matter What Form of Relief He Seeks

As discussed *infra* (§§ II. C. and D), equitable remedies are not available to private RICO plaintiffs, and Petitioner did not sue for equitable relief. Nevertheless, *even if* he had sued for equitable relief, and *even if* it were a remedy available to him, Petitioner's RICO claim fails – as the district court held – because he cannot satisfy the proximate cause requirement this Court mandated in *Holmes*, which precludes him from establishing RICO standing. Thus, even if equitable relief were potentially available to him, Petitioner still would have to meet the standing requirement of 18 U.S.C. § 1964(c) for maintaining a civil RICO action.

The analysis is straightforward. A private plaintiff's standing to bring a RICO action derives from § 1964(c), which authorizes a private suit under RICO by "any person injured in his business or property by reason of a violation of section 1962." (Pet. 2; 18 U.S.C. § 1964(c)). In *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 496 (1985), this Court explained that a private RICO plaintiff "only has standing if, and can only recover to the extent that, he

has been injured in his business or property by the conduct constituting the violation." Then, in *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258, 268 (1992), this Court held that the "by reason of" component of § 1964(c) imposes a proximate cause requirement on the plaintiff, *i.e.*, a civil RICO plaintiff must show the alleged predicate acts were the proximate cause of injury to his business or property. In *Summit* the Fifth Circuit held that for mail or wire fraud the proximate cause requirement of *Holmes* can be met only by an allegation that the private plaintiff personally received and relied on the alleged misrepresentation. *Summit*, 214 F.3d at 560-62. Taken together, these cases mean that a private plaintiff who cannot allege that he relied on the defendants' misrepresentations cannot establish the proximate cause required under *Holmes* (and also by *Summit* in the Fifth Circuit). Consequently, under *Sedima* such a plaintiff has no standing to bring a RICO claim based on mail or wire fraud.

Here Petitioner admitted that he did not rely on any alleged misrepresentations by any Respondent and therefore could not satisfy the detrimental reliance requirement of *Summit*. As a result, he could not meet the requirements of § 1964(c) and has no standing to assert a civil RICO claim regardless of what form of relief he seeks. Thus, whether or not equitable relief is available to private RICO plaintiffs, the district court correctly held his RICO claim failed as a matter of law.[15]

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[15] No case – not even *NOW* – would allow a private plaintiff who lacks standing under § 1964(c) to maintain a RICO action for equitable relief. Even that court believed a private RICO plaintiff must meet the standing requirements of § 1964(c) to be able to maintain an action for equitable (or any other form of) relief under § 1964(a). The *NOW* court's

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C. RICO Does Not Authorize Private Plaintiffs To Seek Equitable Relief

Even if Petitioner could meet RICO's standing requirements, no federal court of appeals other than the Seventh Circuit in *NOW* has held that private plaintiffs can seek injunctive or other equitable relief under RICO. Indeed, the great weight of authority holds that RICO does not authorize equitable relief for private parties.

For example, in *Religious Tech. Ctr. v. Wollersheim*, 796 F.2d 1076 (9th Cir. 1986), *cert. denied*, 479 U.S. 1103 (1987), the Ninth Circuit rejected the availability of injunctive relief for private RICO plaintiffs based on a thorough analysis of both the statute's language and its legislative history. The court reversed a district court's order granting an injunction against the use or dissemination of materials allegedly stolen from the Church of Scientology because "injunctive relief is not available to a private plaintiff in a civil RICO action." *Wollersheim*, 796

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theory was that private parties could sue for injunctive relief by virtue of "the combination of grants in §§ 1964(a) and (c)." *NOW*, 267 F.3d at 697. In other words, the *NOW* court believed that § 1964(c) grants private parties a right of action under the terms specified, and § 1964(a) grants district courts the authority to render injunctive relief in such actions. Therefore, even under the *NOW* theory Petitioner could not obtain equitable relief because he cannot meet the proximate cause requirement of § 1964(c) and hence lacks standing to bring a private RICO action. In fact, the prior opinions in the case establish that the *NOW* courts clearly regarded standing under § 1964(c) as an indispensable element of the plaintiffs' case. On appeal from an initial dismissal of plaintiffs' RICO claims, this Court said "the threshold question" was "whether petitioners have standing to bring their claim." *National Org. For Women, Inc. v. Scheidler*, 510 U.S. 249, 255 (1994). The Court proceeded only after satisfying itself that plaintiffs had adequately alleged injury to their business or property *by reason of* the defendants' alleged conspiracy. *Id.* at 255-56.

F.2d at 1077. In reaching its decision, the court first analyzed the language of the statute itself:

> Part (a) is a broad grant of equitable jurisdiction to the federal courts. Part (b) permits *the government* to bring actions for equitable relief. . . . Part (c), the private civil RICO provision, states that a private plaintiff may recover treble damages, costs and attorney's fees. In contrast to part (b), there is no express authority to *private plaintiffs* to seek the equitable relief available under part (a). . . .
>
> [T]he inclusion of a single statutory reference to private plaintiffs, and the identification of a damages and fees remedy for such plaintiffs in part (c), logically carries the negative implication that *no other remedy* was intended to be conferred on private plaintiffs.

Id. at 1082-83 (emphasis in original).

Next, the court confirmed that RICO's "legislative history mandates us to hold that injunctive relief is not available to a private party in a civil RICO action." *Id.* at 1084. The court stressed that proposed language expressly authorizing private plaintiffs to sue for injunctive relief as well as treble damages had been rejected by a Congressional subcommittee, which instead adopted a bill that "explicitly created *only* the private action for treble damages which was eventually enacted as section 1964(c)." *Id.* (emphasis in original). Moreover, the Ninth Circuit also found it significant that Congress had subsequently rejected a proposed amendment to § 1964 that would have expressly permitted private parties to sue for injunctive relief. *Id.* at 1085-86. For these reasons, the court concluded that the statute's legislative history also did not support a claim for equitable remedies for private plaintiffs:

> The clear message from the legislative history is that, in considering civil RICO, Congress was repeatedly presented with the opportunity *expressly* to include a provision permitting private plaintiffs to secure injunctive relief. On each occasion, Congress *rejected* the addition of any such provision.

Id. at 1086 (emphasis in original).

Finally, the Ninth Circuit noted that analogy to the antitrust laws also supported its decision. The court observed that "civil RICO was intended to provide a private cause of action modeled on the analogous provision of the antitrust laws." *Id.* at 1086. The court stressed that the Supreme Court had already held § 4 of the Clayton Act – the provision of the antitrust laws analogous to RICO's § 1964(c) – did not permit a private plaintiff to sue for injunctive relief. *Id.* at 1087. Rather, private antitrust plaintiffs could obtain injunctive relief *only* because another section of the antitrust laws – for which there is no analogous RICO provision – expressly authorized such relief. *Id.* Summarizing its findings, the Ninth Circuit concluded that "taken together, the legislative history and statutory language suggest overwhelmingly that no private equitable action should be implied under civil RICO." *Id.* at 1088.

Although the Fifth Circuit did not deem it necessary to decide the issue (Pet. App. 16), it, and virtually every other court of appeals that has commented on the issue, has also expressed serious doubt that injunctive or equitable relief is available to private plaintiffs under RICO. In *In re Fredeman Litig.*, 843 F.2d 821 (5th Cir. 1988), the Fifth Circuit reviewed the Ninth Circuit's *Wollersheim* decision at length, *id.* at 828-30, and found "the analysis contained in the *Wollersheim* opinion persuasive":

> Congress indeed had several opportunities to give express authorization to private injunctive actions but chose not to do so, apparently because it hesitated in the face of the ramifications of that remedy.

Id. at 830. While the court acknowledged that RICO should be "liberally construed to effectuate its remedial purposes," *id.* at 830, it concluded that "liberal construction" did not allow it to disregard convincing evidence that Congress had not authorized private injunctive remedies. *In re Fredeman*, 843 F.2d at 830.[16]

In light of the strong and persuasive statements by both the Ninth and Fifth Circuits, it is not surprising that the majority of other federal courts of appeals have also expressed substantial doubt that injunctive or other equitable relief is available to private RICO plaintiffs.[17] *E.g.*, *Switzer v. Coan*, 261 F.3d 985, 992 n.14 (10th Cir. 2001) ("there is considerable doubt that equitable relief is available to private RICO litigants under any circumstances"); *Johnson v. Collins Entm't Co., Inc.*, 199 F.3d 710, 726 (4th Cir. 1999) (noting "substantial doubt whether RICO grants private parties . . . a cause of action for equitable relief" and "this doubt is especially acute in

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[16] Subsequent to its *In re Fredeman* decision, the Fifth Circuit has continued to (1) reiterate substantial doubt that injunctive relief is authorized under RICO for private plaintiffs, and (2) emphasize agreement with the Ninth Circuit's holding in *Wollersheim*. *See Bolin v. Sears, Roebuck & Co.*, 231 F.3d 970, 977 n.42 (5th Cir. 2000); *Price v. Pinnacle Brands, Inc.*, 138 F.3d 602, 605 n.5 (5th Cir. 1998); *Conkling v. Turner*, 18 F.3d 1285, 1296-97 nn.7 & 8 (5th Cir. 1994).

[17] Most courts have found it unnecessary to decide the issue directly because a civil RICO plaintiff normally has pendent state law claims that will support an award of injunctive relief and obviate the need to decide the RICO issue.

light of the fact that Congress has declined to authorize injunctive remedies for private parties"); *Lincoln House, Inc. v. Dupre*, 903 F.2d 845, 848 (1st Cir. 1990) ("it is not clear whether injunctive or other equitable relief is available at all in private civil RICO actions"); *Trane Co. v. O'Connor Sec.*, 718 F.2d 26, 28 (2d Cir. 1983) (expressing "serious doubt" about "the propriety of private party injunctive relief" under RICO).

In contrast, the Seventh Circuit in *NOW* is the only federal court of appeals that has allowed injunctive relief to a private litigant under RICO.

D. Petitioner Sued for Damages and Not for Equitable Relief

Finally, while Petitioner hypothesizes that he could sue for equitable disgorgement, in fact he did not. In Petitioner's Second Amended Complaint, Petitioner repeatedly emphasized that the relief he sought on behalf of the class was damages. (Shell App. 35-80, ¶¶ 32(d), 34-36, 50, 73, 79, 86, 92, 141, 151, 160, 161(1)). His only request for equitable relief was for an injunction to bar the use of the *Cox* and *Spencer* judgments to preclude the class "from asserting their rights to recover *damages*." (Shell App. 74, ¶ 129 (emphasis added)). Moreover, contrary to Petitioner's representation (Pet. 20), the class Petitioner sought to certify was a damages class. (3 R. 795-806).

In short, Petitioner's argument for equitable disgorgement was purely hypothetical – conjured up only as a last-ditch effort to try and avoid having to show the direct

reliance necessary to establish RICO damages under *Summit*.[18]

CONCLUSION

The petition for writ of certiorari should be denied. The judgment of the Fifth Circuit was surely correct. The district court properly dismissed Richard's due process attack on the *Cox* and *Spencer* judgments for lack of subject matter jurisdiction under the *Rooker-Feldman* doctrine. In addition, the district court properly dismissed Richard's RICO claim for failure to state a claim.

Respectfully submitted,

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[18] Petitioner argues that he "should have been allowed to amend [his] complaint." (Pet. 23). However, Petitioner never sought leave of the district court to amend his complaint. It is well established that a party does not preserve error by merely alleging he should have been given an opportunity to amend his complaint or that he stood ready to amend his complaint. *Great Plains Trust Co. v. Morgan Stanley Dean Witter & Co.*, 313 F.3d 305, 330 (5th Cir. 2002); *United States v. Totten*, 286 F.3d 542, 552 (D.C. Cir. 2002) (plaintiffs whose complaint was dismissed for lack of subject matter jurisdiction waived right to amend by failing to make a motion either before or after the district court granted their opponent's dismissal motion). Instead, a party must move to amend his complaint and claim as error on appeal the district court's failure to allow him to amend. *See id.* Petitioner did neither. Accordingly, he has waived the alleged error.

APPENDIX

IN THE CHANCERY COURT
FOR OBION COUNTY, TENNESSEE
AT UNION CITY, TENNESSEE

TINA COX, CHARLES HOMER CLOAR, MARY H. CLOAR, MELODY ALFORD, COUNTRY VILLAGE MOBILE HOME PARK, and PHYLLIS BIRMINGHAM, individually and on behalf of all other individuals and entities similarly situated, Plaintiffs, v. SHELL OIL COMPANY, d/b/a SHELL CHEMICAL COMPANY, and HOECHST CELANESE CORPORATION, Defendants.	Civil Action No. 18,844 CLASS ACTION OBION COUNTY

FINAL ORDER APPROVING THE CLASS ACTION SETTLEMENT, ATTORNEYS' FEES AND EXPENSES, AND AWARDS TO REPRESENTATIVE PLAINTIFFS

(Filed Nov. 17, 1995)

This matter is before the Court on motion by the parties[1] for final approval of their proposed settlement

[1] The parties are the named individual and representative *Cox* plaintiffs, on behalf of the certified Settlement Class, and defendants

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(the "Settlement") as set forth in the Settlement Agreement filed July 31, 1995, as amended by an Amendment dated October 6, 1995, a Second Amendment dated October 24, 1995, and a Third Amendment dated November 9, 1995 (the "Agreement"). Also before the Court is the Application of Class Counsel for Award of Attorneys' Fees and Expenses, and Awards to the Representative Plaintiffs (the "Application"). A duly noticed hearing on the motion and Application was held on November 8 and 9, 1995, (the "Fairness Hearing") pursuant to the Court's Order of July 31, 1995, granting preliminary approval of the Settlement and the August 7, 1995, order conforming the class definition (collectively the "Preliminary Approval Order"), under procedures set forth in the August 24, 1995, Order Approving Forms of Notice, Scheduling Fairness Hearing and Setting Opt-out and Objection Dates.

Notice of the Fairness Hearing was given to potential class members nationwide in accordance with the Preliminary Approval Order and the Court approved notice program. Voluminous pleadings and briefs were submitted by the settling parties in support of the Settlement and in response to all objections and motions filed regarding the Settlement, including the various objections and related papers filed by objector Tony Martin, *et al.*, and affiliated objectors through their attorneys (the "Martin Objectors"). The parties, numerous interested members of the Settlement Class, and others appeared at the Fairness Hearing, either individually or by their respective attorneys. The Court heard and

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Shell Oil Company d/b/a Shell Chemical Company and Hoechst Celanese Corporation.

considered evidence in support of the proposed Settlement. This evidence included live testimony, affidavits, documentary and video presentations, as well as oral representations by various attorneys. The attorneys for the parties and others were heard. An opportunity to be heard was given to all other persons requesting to be heard in accordance with the Preliminary Approval Order. This included a significant number of members of the Settlement Class who, in some instances, had traveled great distances from other states to appear and participate in the Fairness Hearing, who were invited to and did make statements and ask questions regarding the terms of the Settlement and the relief it provides.

As more fully set forth below, the Court has determined that the notice given to members of the Settlement Class certified in the Preliminary Approval Order fully and accurately informed the Settlement Class members of all material elements of the proposed Settlement; was the best notice practicable under the circumstances; was valid, due, and sufficient notice to all Settlement Class members; and complied fully with Rule 23 of the Tennessee Rules of Civil Procedure, the United States Constitution, and any other applicable law.

OPINION

The Court has greatly benefited from the fine briefs and oral arguments of the attorneys in this case, all of whom are worthy adversaries, and appreciates the manner in which they have conducted themselves in this most difficult, complex, and hotly contested litigation. Great credit must be given to Judge Richard Silver of

Monterey County, California for his initiative to coordinate a settlement conference with the *Cox* and *Spencer*[2] parties. The revised *Cox* Settlement is due, in no small part, to his efforts. The Court also commends Judge Hardaway of Greene County, Alabama, for his willingness to join in this unprecedented effort by three state courts to coordinate and settle competing national class actions. As to the settling parties, the plaintiffs, the plaintiff class, Shell Oil Co., and Hoechst Celanese Corp., the Court acknowledges that if it were not for your recognition of this opportunity to reach a global settlement of these issues, all of these efforts would have been in vain. You have put aside your armor and your hardened positions from years of battle and have finally made peace.

Compromises are favored in the law. Neither this Court, nor any court, has the resources to fully litigate all issues, nor is it always fair to the parties to do so. The time, cost, and lack of finality of protracted litigation require certain matters to be settled. The polybutylene plumbing litigation's time has come. Closure is not only appropriate, but timely. The parties to this and to the many other individual and group cases that have comprised the polybutylene plumbing litigation have fought long and hard with varying degrees of success and defeat; however, the affected party, the consumer, has seen very little benefit from these efforts. The *Cox* settlement agreement is a compromise. In every compromise, each side must abandon or set aside its ideal

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[2] *Spencer, et al. v. Shell Oil, et al.*, Case No. CV 94-074, Circuit Court of Greene County Alabama, Honorable Eddie Hardaway, Jr., presiding.

position and reach an agreement that is fair and reasonable to all concerned under the circumstances, and not insist on terms only beneficial to one party. The *Cox* settlement is not perfect. I would have preferred that the Agreement include no leak requirements and a larger claims "window" for class members. The Court has some concern the $75 million cap on past damages may not adequately pay all past damages in full; however, these concerns must be weighed in light of the numerous unique advantages to the consumer that the *Cox* settlement does provide.

The Court finds the Settlement is fair, adequate and reasonable. The $950 million dollars is a minimum contribution of the defendants to those who are affected by polybutylene plumbing. When the court initially gave preliminary approval to the proposed Settlement, this factor was the leading factor in granting that approval. As counsel for the parties have confirmed at various times in open court as the hearings have progressed in this matter, the initial funding commitment (now increased to $950 million) may ultimately be more if funds are expended and provided by the defendants and if other responsible parties contribute to the fund in the future. Due to the uncertainty of the size of the class and how many claims will ultimately be filed, this Court would not have approved a "limited fund" which provided less than full relief while demanding full release. If the worst case does present itself, that is, if the class is as large as six million people, all claims are presented, and the fund is totally expended; the only prejudice to the consumer will be the delay caused by the filing of claims and payment of funds. The Agreement tolls statutes of limitations for class members. The

Agreement provides that any consumers not fully reimbursed or compensated under the terms of the Agreement would be able to pursue all legal and equitable claims and remedies (including punitive damages) individually and as a class.

The Court finds the notice program is excellent. As specified in the findings below, the evidence supports the conclusion that the notice program is one of the most comprehensive class notice campaigns ever undertaken. The Court is satisfied that all reasonable efforts have been made to reach affected consumers.

The Court must also consider the complexity, the expense, and the likely duration of these proceedings if settlement were not reached and approved. The Court must weigh the benefits of settlement against the likely outcome of litigation. As the Court has already stated, much has been spent and much has been done over the past years in group and individual polybutylene pipe litigation across the country, but not much has been accomplished for the benefit of the consumer. The claims in *Cox* and *Spencer* each have their own legal problems, which, if fully litigated, would delay the ultimate resolution of these cases for many years to come. If litigated, complex legal issues would be presented, such as statutes of limitations and repose, choice of appropriate state laws, liability, and measure of damages. All of these issues, if litigated and appealed, could clog the courts across the country for years to come. There is a question as to whether some state courts would give full faith and credit to another state court's determination of these issues.

It is an important aspect of the Settlement that the plaintiffs' attorney's fees and costs are paid by the defendants in addition to the settlement fund, and are not deducted from the settlement fund. In the absence of a comprehensive Class Settlement now, as presented here in *Cox*, after the resolution of the contentious issues described above, any ultimate recovery available for consumers would be reduced by attorney's fees. These normally range from a third to forty percent. None of this delay, risk, mounting transaction costs and reduction of recovery by individual fees would be in the long-term interest of the consumer. In *Cox*, the attorney's fees requested are much less; approximately five percent of the settlement fund; moreover, unlike a typical contingent fee, they are not paid from the fund. The request for fees in the case is approved. The Court finds that they are reasonable under the circumstances, and the Court is pleased to approve them.

The Court is pleased with the reaction of the class members to the proposed Settlement. The Court is greatly comforted by the small number of individual opt-outs, the removal of objections by *Spencer* class counsel and by Tony Martin, who is represented by the Fleming group, and the support expressed by the consumers who testified at the Fairness Hearing. The Court finds that the Consumer Plumbing Recovery Center ("CPRC") claims facility procedures which have been outlined to the Court and which are provided for in the Agreement, appear to constitute a simple, consumer-friendly and efficient method of adjusting the claims in this case.

The discussions and negotiations that ultimately lead to the settlement presented for Court approval were, from all reports and from the Court's own observation,

intensive, exhaustive, and often heated. The Court finds the Agreement is the result of good faith, arms-length, and non-collusive negotiations. The Agreement is fair, adequate, and reasonable under the circumstances, and it is approved.

ADDITIONAL FINDINGS AND CONCLUSIONS

The entire matter of the proposed Settlement and the Application having been fully heard and duly considered by the Court, the Court further FINDS and CONCLUDES, in addition to the findings and conclusions in the foregoing Opinion, as follows:

1. The polybutylene plumbing litigation has been pending, in various forms and in various courts around the country, for more than a decade. It has included individual cases, cases with large numbers of individual plaintiffs, and putative nationwide or statewide class actions brought in federal court and in many state courts.

2. The first nationwide polybutylene plumbing class action was filed in September 1993 by lawyers who are now members of the team of *Cox* Class Counsel. The action, *Robert Beeman, et al. v. Shell Oil Company, et al.*, No. 93-047363, was filed in a state district court in Harris County, Texas.

3. Over the course of many months of intensive negotiations, involving a neutral mediator at many critical junctures, a tentative settlement of the *Beeman* case was achieved in October 1994. In February 1995, however, the Texas state court denied preliminary approval of that settlement without comment.

4. After the Court in this case certified the nationwide class on June 13, 1995, *Cox* Class Counsel joined with the plaintiffs' attorneys in the *Beeman* action to prosecute this case for the benefit of mobile and site-built homes with polybutylene plumbing across the country.

5. Collectively, this combined team of Class Counsel included highly qualified and well-regarded lawyers with extensive class action and complex litigation experience, as well as lawyers with vast experience in polybutylene plumbing litigation.

6. Class Counsel then were able to negotiate a settlement generally patterned after that originally arrived in *Beeman*, although the minimum funding commitment was $100 million greater, other features were added, and only two of the three *Beeman* defendants, Shell and Celanese, were involved.

7. Because of the pendency of a nationwide class action in Greene County, Alabama, and of other polybutylene actions around the country, with many brought as class actions, including an uncertified case for a putative statewide mobile homeowner class in the Superior Court of Monterey County, California,[3] Judge Hardaway and this Court agreed that Judge Silver in Monterey would further the cause of final resolution of polybutylene plumbing litigation if he was appointed to serve as a settlement judge for all three courts.

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[3] *Meers, et al vs. Shell Oil, et al*, Case No. M 30590, Superior Court of the State of California, County of Monterey, Honorable Richard M. Silver, presiding.

8. Judge Silver issued an October 12, 1995 *Order Setting Settlement Conference* with the endorsement of this Court and Judge Hardaway, to convene the coordinated settlement process. Other state courts with proposed class actions were asked, by the parties and/or by Judge Silver, to dismiss or stay their proceedings in deference to the coordinated settlement effort in order to give it an opportunity to succeed, undistracted by collateral litigation.

9. Accordingly, from October 23, 1995, through November 7, 1995, the day before the Fairness Hearing in this Court, intensive and continuous global settlement negotiations were conducted among *Cox* Class Counsel, the *Spencer* counsel, and defendants' counsel and representatives through the mediation and supervision of Judge Silver.

10. As a result of these concentrated efforts, a comprehensive settlement was reached, resulting in significant enhancements to the Settlement as it was originally presented to the Court and preliminarily approved on July 31, 1995.

11. The resulting Settlement, documented and as presented for final approval at the Fairness Hearing, provides consumers with a recovery program consisting of reimbursement of otherwise unreimbursed expenses for repairs to and replacement of leaking polybutylene plumbing systems and property damage caused by such leaks, as well as an extensive program for replacement of such leaking plumbing systems.

12. Some of the features of this Settlement are these:

a. Free replacement of polybutylene plumbing systems installed since January 1, 1978, if two or more qualifying leaks occurred before August 21, 1995, or if only one such leak occurs either in the two years following that date or during a period (of from 10 to 16 years, depending on the type of structure) following installation of the system;

b. Reimbursement of the unreimbursed expenses of plumbing repairs, replacements, and property damage from January 1, 1978, to August 21, 1995, up to $75 million will be distributed, *pro rata* if necessary, for these expenses; and property damage after August 21, 1995, at 100 cents on the dollar;

c. An unlimited funding potential, with the defendants committed to to [sic] initially provide up to $950 million for the relief; if additional funds are required, the defendants will either provide them, or litigation will be resumed with all applicable statutes of limitations and repose tolled in the interim;

d. Provision for additional relief to eligible members of the Settlement Class who experience special needs in connection with qualifying leaks;

e. A comprehensive notice program, including notice every three years through the life of the program, which ends in 2009; and

f. The payment of class counsel's attorneys' fees and expenses in addition to the $950 million reserved for relief for the Settlement Class.

13. The Court is not aware of any other class action settlement with successive notice as provided in the *Cox* Settlement.

14. In reaching this Settlement, the defendants have foregone very significant defenses and issues which could have precluded or limited liability as to some or many class members' claims. These include the statutes of limitations and repose, selection of the appropriate states' laws applicable to various issues, the "economic loss" limitation on recoveries of the type sought here, the lack of privity between the members of the Settlement Class and the defendants, the fact that many of the members of the Settlement Class purchased their structures "as is," and, of course, the risk that plaintiffs would not be successful in proving their allegations. In agreeing to this Settlement, the defendants have displayed commendable corporate responsibility, responsiveness, and good will toward consumers.

15. The Court appointed Rust Consulting, Inc. and Kinsella Communications Ltd. as class notice providers in this case. Richard Redfern, president of Rust Consulting, and Katherine Kinsella, president of the communications firm bearing her name, testified at the Fairness Hearing. The Court also considered Ms. Kinsella's affidavit and the affidavit of Jeffrey Dahl, Executive Vice President of Rust Consulting, in connection with their activities as notice providers.

16. *Cox* Class Counsel and the notice providers worked with Todd B. Hilsee, an experienced class action notice consultant, to design a class notice program of unprecedented reach, scope, and effectiveness. Mr. Hilsee was accepted by the Court as a qualified class notice expert at an earlier hearing to approve the commencement of the notice program. He testified at the Fairness Hearing, and his affidavit was also considered

by the Court, as to the operation and outcome of this program.

17. The above-mentioned individuals provided documents, information, and affidavits at the outset of the notice period that assisted the parties in designing, and the court preliminarily approving for implementation, a singularly comprehensive and creative notice program.

18. Beginning in August, 1995, and extending into October, 1995, an extensive notice effort was undertaken in this case to implement the Court approved notice program specified in the Preliminary Approval Order.

19. Since not all Settlement Class members were known or readily identifiable, the notice program implemented in this case combined multimedia publication (newspapers, magazines, radio and television), individual mailed notice, ongoing press and media outreach, and a toll-free telephone information service. The purpose of the program was to make potential Settlement Class members aware of the Action and the Settlement, and to encourage them to identify themselves to the notice providers, as they could receive further written notices and information, and be placed on the notice providers' Settlement Class member database.

20. Commencing on or before August 21, 1995, which is the Initial Notice Date as specified in the Agreement, more than 5.6 million copies of the Court approved Notice of Class Action and Proposed Settlement were mailed, by first class mail or overnight service, to Settlement Class members in accordance with the Preliminary Approval Order.

21. During September, 1995, the Court approved summary notice was published in *Parade* Magazine, *USA Weekend*, *People* Magazine, and *TV Guide* in accordance with the Preliminary Approval Order. The combined circulation of these consumer publications and national magazines is over 73 million. During August and September, 1995, Court approved notice appeared twice in Friday editions of *USA Today*, with combined circulation of over 4.7 million.

22. Also during September, 1995, the Court approved summary notice appeared in 201 daily and weekly newspapers in 13 targeted states (Alabama, Arizona, California, Colorado, Florida, Georgia, Louisiana, Maryland, Nevada, North Carolina, South Carolina, Texas, and Virginia) and the District of Columbia. The combined circulation of these newspapers exceeds 23.6 million. In addition, the notice appeared in Spanish in 38 Hispanic newspapers, with a combined circulation over 3 million, in 29 media markets during September, 1995. Moreover, the notice appeared in 247 daily, weekly, bi-monthly, and monthly African-American newspapers with a combined circulation of nearly 6 million.

23. Notices were also published in the October, 1995, editions of various trade publications, comprising a total circulation of 244,000.

24. A 30-second spot television notice was produced and appeared 213 times from August 21, 1995, through September 3, 1995, on national and cable television, including on such networks as ABC, NBC, CBS, TNN, CNN, and TNT. During the same period, a 30-second Spanish language television notice appeared

18 times on the Univision Network, a popular Spanish language network.

25. A press release, a media advisory, a public service announcement, a video news release, a radio news release, and a press kit were all prepared and disseminated as part of the notice program in this case. The press release went to 2,000 newspapers, wire services, magazines, and broadcast points across the United States through PR Newswire. The press release and media advisory were also disseminated to 469 media outlets, specifically targeting consumer reporters and media in the top 250 media markets and 84 local daily newspapers in the 13 targeted states and the District of Columbia. 142 outlets, with a combined circulation of more than 14.5 million, have confirmed using the press materials to publish articles. It is estimated that the public service announcement was broadcast by radio stations yielding nearly 2.9 million gross impressions; an additional 5.5 million impressions are estimated from the broadcast of the radio news release. The video news release was used by at least 21 outlets with combined viewership of more than 1.7 million. Finally, a two-column article was provided to 10,000 daily and weekly newspapers.

26. Court approved notice forms were disseminated through various online computer services, including CompuServe, Prodigy, and America Online, and with Legal Link on the Internet.

27. The various forms of published notice provided recipients with a toll free "800" telephone number to which potential Settlement Class members could call to obtain further information and to request the full notice

packet to be mailed to them. The telephone message was updated as the notice program progressed, and commonly raised questions were answered by live operators, in English or Spanish as required by the caller. The parties prepared and updated scripts and information by which the operators were able to provide the general information commonly requested by callers.

28. The toll-free telephone facility established for notice purposes in this case received more than one million telephone calls in response to the published notice program.

29. Over 195,000 requests for a claim form have been received by the notice providers.

30. Mr. Hilsee demonstrated, by affidavit and in live testimony at the Fairness Hearing, a number of significant facts regarding the reach and effectiveness of the notice. The national media campaign reached an extraordinarily high percentage of United States adults aged 35 years and over: approximately 114 million individuals, or 92.11% of this population. Each of these adults was exposed to the national media notice an average of 4.01 times. The national media campaign also reached approximately 151 million persons in the United States aged 25 years and over, representing 90.88% of this population. Each of the individuals in this larger, secondary target group was reached an average of 3.76 times by the national media notice, a frequency that also exceed [sic] the primary target reach in other class actions. These are higher reach and frequency statistics than have been found adequate by courts in other class actions. These data do not include the reach of the notice campaign through means other

than the national paid notice campaign, such as the television and print notices targeted to Hispanic and African-American media, the local newspaper notices, the non-paid media and direct mail notices to millions of Settlement Class members.

31. Multifaceted notice programs like that implemented in this case have been approved by other courts and utilized successfully for similar purposes in large consumer or product class actions such as this one, where most class members are not individually identified at the outset. *See, e.g., In re Domestic Air Transportation Antitrust Litigation*, 141 F.R.D. 534 (E.D. Pa. 1992); 148 F.R.D. 297 (E.D. Pa. 1992); *In re Silicone Gel Breast Implant Products Liability Litigation*, MDL 926 (N.D. Ala. 1994); *Roberts v. Bausch & Lomb, Inc.*, 94-C-1144-W (N.D. Ala. 1995).

32. As other courts have done with respect to the less comprehensive notice programs they approved, this Court finds that the notice program described above, as designed and implemented, met and exceeded the requirements of the United States Supreme Court, Tennessee's Rule 23, due process and the Constitution, as construed in *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985) and its progeny.

33. Thus, the best notice practicable under the circumstances has been provided to members of the Settlement Class. That notice accurately and adequately advised them of this action; the proposed Settlement and its terms, features, and benefits; their rights and options; and the applicable procedures and deadlines for exercising them.

34. A full opportunity has been provided to the members of the Settlement Class to participate in the Fairness Hearing, both orally and by way of written submission to the Court.

35. The Court previously found the requirements of Rule 23 of the Tennessee Rules of Civil Procedure were met and certified a nationwide class for litigation and trial purposes in the Order of National Class Certification. While such certification was and is contested by the defendants, they have agreed to class certification for settlement purposes, to promote a comprehensive, classwide resolution of polybutylene pipe litigation.

36. The numerosity, typicality, commonality, and adequacy requirements of Rule 23.01 of the Tennessee Rules of Civil Procedure are satisfied as to the Settlement Class in connection with the Settlement in this case.

37. In accordance with Rule 23.02(3), common issues of fact and law predominate and make certification of the Settlement Class for settlement purposes efficient and appropriate. The members of the Settlement Class have been afforded the right and opportunity to exclude themselves from the Settlement Class.

38. The settlement encompassed within the Agreement is in all respects fair, reasonable, and adequate and in the best interests of the Settlement Class.

39. The Court-approved notice program provided clear and simple procedures and instructions for the submission of objections by or on behalf of Settlement Class members. For example, paragraph 10 of the Court-approved *Notice of Class Action and Proposed*

Settlement required objections to be submitted, in writing, postmarked not later than October 20, 1995, and further stated, "if you do not comply with the procedure and the deadline stated herein, you may not be entitled to be heard at the Fairness Hearing or to otherwise contest the approval of the Settlement, or to appeal from any orders or judgments of the Court entered thereon." All objections, however styled, that failed to comply with the procedures and deadlines set forth in the notice program, are hereby found to be procedurally deficient and are disqualified in accordance with the foregoing statement.

40. The Court has also reviewed the Principles of Agreement dated November 7, 1995, executed by the parties, including the terms applicable to U.S. Brass Corp., Eljer Manufacturing, Inc., and Eljer Industries, Inc. The terms of the Principles of Agreement appear to be reasonable and in accordance with the efforts being made to seek a global resolution of all litigation pertaining to the issues among the parties. The prior *Cox* settlement was unclear as to the effect of funds received from U.S. Brass Corp., Eljer Manufacturing, Inc., and Eljer Industries, Inc. The revised settlement makes clear that amounts received from U.S. Brass and/or Eljers will add to the minimum fund of $950 million. If that settlement is perfected and approved by the United States Bankruptcy Court, the minimum fund would substantially increase.

41. In independently determining to approve the Settlement and the Application, the Court has considered the substance of all objections to the Settlement, whether timely, qualified or not, including those by the

Martin Objectors and others that have since been withdrawn or stricken.

42. Certain objectors have asserted that the proposed Settlement must be reduced by a proposed settlement of claims against du Pont in the *Spencer* case pending in the Circuit Court of Greene County, Alabama, which the objectors characterized as a $120 million settlement.

43. The proposed du Pont settlement has not been approved by the *Spencer* court, and this Court may not speculate whether it will be approved by the *Spencer* court.

44. The proposed du Pont settlement in *Spencer* purports to entitle a claimant to a rebate of 8% of monies the claimant pays for replumbing his or her structure.

45. The Settlement before this Court, in the minimum amount of $950 million, provides for the assignment of Settlement Class members' claims against du Pont and others to defendants Shell and Celanese.

46. Objectors are incorrect in asserting that the "credit" arising from the assignment reduces the Defendants' contribution to the Settlement. The original *Cox* settlement was $850 million to be paid by the Defendants. The revised *Cox* settlement requires the Defendants to pay a minimum of $950 million to consumers with assignment of rights, against du Pont, regardless of whether du Pont ultimately participates in the settlement. The revised *Cox* settlement substantially increases benefits to consumers.

47. Contrary to objectors' assertions, all interest earned on funds held by the CPRC will be for the benefit of

the Settlement Class and will not be credited against the Defendants' obligations under the Agreement.

48. Because of the structure of the Settlement, the Defendants' obligation to fund the CPRC on an ongoing, as-needed basis, and the Defendants' obligation to pay reimbursement for Past Expenses in a reasonable time after the close of the one year claim filing period on August 21, 1996, and any related opt out period that may be necessary under § 4.5.1 of the Agreement, there is no significant ability by the Defendants to delay payments due under the Settlement.

49. Objectors are incorrect in asserting that, even before the Defendants' initial funding commitment was increased from $850 million to $950 million, the "net funding by Shell and Celanese under . . . the agreement [was] only $547 million."

50. The notice provided to the Settlement Class was neither misleading nor defective.

51. The defendants are each responsible for one-half of the settlement obligations as specified in the Settlement Agreement unless and until the respective liabilities are established by arbitration under the Funding Agreement.

52. The *Cox* Class Counsel have undertaken a reasonable risk that each of the defendant companies will be solvent and capable of fulfilling its obligations under this agreement.

53. Had the plaintiffs settled at separate times with Shell and Celanese, it is highly unlikely that there would ever have been joint and several liability between them.

54. The Settlement is more favorable to the Settlement Class than litigation if it is assumed that one of the defendants will, some years from now, become unable to pay all claims, since the class will receive payment under the Settlement promptly, thereby reducing the number of claimants who would be subjected to proving claims in a bankruptcy.

55. The Agreement provides broad ranging powers for the enforcement of a defaulting defendant's obligations, including the full panoply of equitable powers this Court possesses.

56. The Agreement expressly provides that the default of one defendant does not exonerate the other defendant of its obligations under the Agreement.

57. Past expenses will be compensated after expiration of one year from August 21, 1995, the Initial Notice Date under the Agreement.

58. Claimants will not, contrary to an objection, be required to wait 14 years to receive their entitled reimbursements or distributions under the Agreement.

59. The so-called exclusion of a "hot water heater leak" – a leak occurring within six feet of piping measured from the take-off at the unit's hot water heater – does not apply to any claim for reimbursement of repair costs and property damage. Thus, the only exclusion is for eligibility for a replumb, and even there, the exclusion applies only if (1) it is the first leak in the unit *and* (2) it can be repaired without cutting into the unit's walls, ceilings, or floors.

60. Therefore, a replumb will be provided under the Agreement even if the hot water heater leak is the first leak, if to repair the leak would require cutting into the

walls, ceilings, or floors of the unit. Similarly, there will be a replumb if the hot water heater leak is the second leak in the system.

61. The claimant has the right to select the contractor to do the replumbing and property damage repair work.

62. Nothing in the Agreement abrogates the warranty of work done by the contractors and suppliers of pipe and other components in the replumb.

63. The Agreement permits special relief involving unusual hardship, so long as the CPRC Ombudsman and President concur that such relief should be provided. This provision allows the CPRC to provide relief from a breach of warranty arising out of replumbing work, where the warrantor fails to provide or cannot provide corrective relief. CPRC § VI, E.

64. There is no factual basis for the asserted objection that there is any conflict of interest with respect to the *Cox* Class Counsel.

65. The *Cox* Class Counsel maintained the highest standards of professionalism and advocacy in protecting and promoting the interests of the Class throughout the prosecution and settlement of this case.

66. There is no factual basis for the asserted objection that settlements in individual cases are improperly disparate from the *Cox* Settlement.

67. There is no need to provide additional notice to the entire Settlement Class by reason of the revised terms of the Settlement since the Court approved the notices disseminated to the Settlement Class. All changes have

been to improve the Settlement over that described in the notices, and none of the changes has an adverse impact on any Class member.

68. As class action jurisprudence has accumulated, various federal and state courts, in Tennessee and elsewhere, have articulated criteria and factors that courts may consider in evaluating proposed settlements for final approval. *See, e.g., Third Nat'l Bank v. Scribner*, 212 Tenn. 400, 410, 370 S.W.2d 482 (1963); *Clark Equip. Co. v. International Union, Allied Indus. Workers*, 803 F.2d 878, 880 (6th Cir. 1986), *cert. denied sub nom. Jones v. Clark Equip. Co.*, 480 U.S. 934 (1987); *Williams v. Vukovich*, 720 F.2d 909, 922 (6th Cir. 1983); *Bailey v. Great Lakes Canning, Inc.*, 908 F.2d 38, 42 (6th Cir. 1990); *In re Warner Communications Sec. Litig.*, 618 F. Supp. 735 (S.D.N.Y. 1985) *aff'd*, 798 F.2d 35 (2d Cir. 1986); *Girsh v. Jepson*, 521 F.2d 153, 157 (3d Cir. 1975). This Court has been guided, generally, by the procedures and criteria recommended in the *Manual for Complex Litigation*, 3d ed. (Federal Judicial Center 1995), §§ 30.4 *et seq.*, since the federal and Tennessee class action provisions and criteria are consistent.

69. Factors that may be considered in assessing the fairness, adequacy, and reasonableness of the proposed settlement include: the plaintiffs' likelihood of ultimate success on the merits balanced against the amount and form of relief offered in the settlement; the stage of the proceedings at which the settlement is reached; the extent of cumulative discovery or investigation; the nature of the settlement negotiations; the costs, risks, and delays of establishing liability and damages; the views of experienced counsel; the reaction of the class members themselves; the comparison of the settlement's benefits with

other settlements or with the alternative of continuing litigation; and whether approval of the settlement is in the class members' and the public interest. As the above opinion and findings demonstrate, consideration of these and other recognized factors, such as the participation and recommendations of an experienced and able settlement judge and the testing of the settlement's merits in the class of adversary proceedings, demonstrate the Settlement's entitlement to approval.

70. Expert opinions have been submitted in support of the proposed Settlement. (*See* Opinion of Professor David Rosenberg, Affidavit of Professor Paul H. Rubin). In approving the Settlement, the Court has considered these opinions.

71. The Court will retain jurisdiction and address a supplemental notice program, on a joint motion of the settling parties, to advise all members of the Settlement Class on whose behalf a purported or actual request for exclusion was received of the enhanced Settlement, providing those individuals with a new opportunity to request exclusion from the Settlement Class in light of the enhanced Settlement.

72. There is no just reason for delay in the entry of a final judgment and decree by reason of such supplemental notice and related proceedings or of the retention by the Court of continuing jurisdiction to oversee the implementation and enforcement of the Agreement and Settlement.

73. The Application is fair and should be granted.

Based upon the foregoing, it is hereby ORDERED, ADJUDGED, and DECREED:

1. The Court has jurisdiction over all claims asserted in the Action on behalf of all Settlement Class members and over all parties to the Action, including all members of the Settlement Class.

2. The Settlement Class is defined as follows:

> All persons and entities that (1) own real property or structures in the United States in which there was installed between January 1, 1978 and July 31, 1995, polybutylene plumbing with acetal insert or metal insert fittings or a polybutylene yard service line; (2) own or previously owned such real property or structures and have already incurred any cost or expense, by reason of leakage from, or from failure, repair, or removal of, all or any portion of such polybutylene plumbing or yard service line which was installed between January 1, 1978 and July 31, 1995; or (3) will own such real property or structures during the term of entitlement to relief under the Settlement Agreement.

The definition of the Settlement Class excludes:

> (1) All persons who, in accordance with the terms of the Settlement Agreement, execute a timely request for exclusion from the Settlement Class; (2) the Defendants; the Released Manufacturers; the parent and any subsidiary, affiliate and controlled entity of any of them; and the officers and directors of each of them; and (3) all parties to *Geno Cioe, et al. v. Shell Oil Company, et al.*, Case No. 662214, and *Robert L. Williams, et al. v. Shell Oil Company, et al.*, Case No. 658403, and related combined actions (Case Nos. 640245, 654709, 656787, 661372, 665521 and 665527) in the Superior Court of the State of California in

and for the County of San Diego, and all members of the certified classes in those lawsuits.

3. All members of the Settlement Class who have not timely elected to be excluded from the Settlement Class are members thereof and are bound by this Order and the Final Judgment being entered herewith.

4. Pursuant to Rule 23.01, Rule 23.02, and Rule 23.03 of the Tennessee Rules of Civil Procedure, the Court confirms the certification of the Settlement Class provided in the Preliminary Approval Order and maintains such certification for purposes of final approval of the settlement.

5. The Class Representatives and Plaintiffs' Class Counsel designated in paragraph 8 of the Court-approved *Notice of Class Action and Proposed Settlement* to represent the Settlement Class are hereby confirmed.

6. The Agreement and the Funding Agreement entered into by the Defendants pursuant to the Agreement are hereby made part of the record in this case and as such shall have the full force and effect of an order of the Court.

7. Pursuant to Rule 23.05 of the Tennessee Rules of Civil Procedure, the Court hereby grants final approval of the Agreement and the Settlement set forth in the Agreement and finds that it is fair, adequate, and reasonable to the members of the Settlement Class.

8. The objections that were filed, whether timely or not, have been considered and are all overruled.

9. Accordingly, the Court directs that the Settlement be consummated in accordance with the terms and conditions of the Agreement.

10. Plaintiffs and all members of the Settlement Class are barred and permanently enjoined from prosecuting (in any forum) against Shell Oil Company and/or Hoechst Celanese Corporation any and all claims, demands, causes of action of every kind and nature, obligations, damages, losses, and costs, whether known or unknown, actual or potential, suspected or unsuspected, contingent or fixed, either arising out of or relating to any of the facts, transactions, actions, or conduct alleged in this action, or that were or could have been asserted or sought in the action, other than any past, present, or future claim for bodily injury (including wrongful death) and associated emotional distress and mental anguish.

11. The Complaint as amended, and all claims and causes of action asserted therein are dismissed with prejudice and costs, as provided in the Agreement, to be paid from the settlement fund.

12. The Application is hereby granted. In accordance with the Funding Agreement referred to in the Agreement, the defendants shall pay Plaintiffs' Class Counsel, as attorneys' fees and expenses, the sum of $45 million plus interest at the rate applicable to federal court judgments entered on July 31, 1995, for the period from July 31, 1995, until the earlier of July 31, 1996, or when paid. In addition, in accordance with Section 25.1 of the Agreement and with the Funding Agreement referred to in the Agreement, the defendants shall pay the sum of $3,000.00 to each single Representative Plaintiff or Representative Plaintiff married couple.

13. In the event that the Settlement does not become Final (as more fully defined in the Agreement) in accordance with the terms of the Agreement, then this Order

and the Final Judgment and Decree being entered herewith shall be rendered null and void and be vacated and the Agreement shall be rendered null and void in accordance with the provisions thereof.

14. Without affecting the finality of this Order or of the Final Judgment being entered herewith, the Court shall retain continuing jurisdiction over the Action and the settling Parties (as more fully defined in the Agreement), including all members of the Settlement Class; the administration and enforcement of the Settlement; and the benefits to the Settlement Class, including for such purposes as supervising the implementation, enforcement, construction, and interpretation of the Agreement.

15. Any disputes or controversies arising with respect to the interpretation, enforcement, or implementation of the Agreement shall be presented by motion to the Court.

16. Pursuant to Rule 54.02 of the Tennessee Rules of Civil Procedure, the Court hereby directs the entry of this judgment based upon the Court's finding that there is no just reason for delay notwithstanding the Court's retention of jurisdiction to oversee implementation and enforcement of the Agreement and its continuing jurisdiction to provide for supplemental notice (and related proceedings) to potential members of the Settlement Class as to whom the Court previously received requests for exclusion from the Settlement Class.

/s/ W. Maloan
CHANCELLOR

ENTERED: November 17, 1995

IN THE CHANCERY COURT FOR OBION COUNTY, TENNESSEE AT UNION CITY, TENNESSEE

TINA COX, CHARLES HOMER CLOAR, MARY H. CLOAR, MELODY ALFORD, COUNTRY VILLAGE MOBILE HOME PARK, and PHYLLIS BIRMINGHAM, individually and on behalf of all other individuals and entities similarly situated, Plaintiffs, v. SHELL OIL COMPANY, d/b/a SHELL CHEMICAL COMPANY, and HOECHST CELANESE CORPORATION, Defendants.	Civil Action No. 18,844 CLASS ACTION OBION COUNTY

FINAL JUDGMENT

(Filed Nov. 17, 1995)

This matter is before the Court on motion by the parties for final approval of their proposed settlement as set forth in the Settlement Agreement filed July 31, 1995, as amended by an Amendment dated October 6, 1995, a Second Amendment dated October 24, 1995, and a Third Amendment dated November 9, 1995 (the "Agreement"). Also before the Court is the Application of Class Counsel for Award of Attorneys' Fees and Expenses, and Awards to the Representative Plaintiffs (the "Application").

A hearing on the motion and Application was held on November 8 and 9, 1995, pursuant to the Court's Order of

July 31, 1995, granting preliminary approval of the settlement and the August 7, 1995, order conforming the class definition, under procedures set forth in the August 24, 1995, Order Approving Forms of Notice, Scheduling Fairness Hearing and Setting Opt-outs and Objection Dates.

This Final Judgment is entered pursuant to a Final Order Approving the Class Action Settlement, Attorneys' Fees and Expenses, and Awards to Representative Plaintiffs (the "Final Order") which is entered together herewith. The Court has determined that the Class Action Settlement, as encompassed within the Agreement, should be approved as fair, adequate, and reasonable to the Settlement Class under Rule 23.05 of the Tennessee Rules of Civil Procedure, and that the Application should be granted.

The Court has further determined that there is no just reason for delay in the entry of final judgment in accordance with the Final Order pursuant to Rule 54.02 of the Tennessee Rules of Civil Procedure.

Accordingly, it is ORDERED that judgment is hereby entered in accordance with the Final Order.

It is further ORDERED that the Settlement Class is defined as follows:

> All persons and entities that (1) own real property or structures in the United States in which there was installed between January 1, 1978 and July 31, 1995, polybutylene plumbing with acetal insert or metal insert fittings or a polybutylene yard service line; (2) own or previously owned such real property or structures and have already incurred any cost or expense, by reason of

leakage from, or from failure, repair, or removal of, all or any portion of such polybutylene plumbing or yard service line which was installed between January 1, 1978 and July 31, 1995; or (3) will own such real property or structures during the term of entitlement to relief under the Settlement Agreement.

The definition of the Settlement Class excludes:

(1) All persons who, in accordance with the terms of the Settlement Agreement, execute a timely request for exclusion from the Settlement Class; (2) the Defendants; the Released Manufacturers; the parent and any subsidiary, affiliate and controlled entity of any of them; and the officers and directors of each of them; and (3) all parties to *Geno Cioe, et al. v. Shell Oil Company, et al.*, Case No. 662214, and *Robert L. Williams, et al. v. Shell Oil Company, et al.*, Case No. 658403, and related combined actions (Case Nos. 640245, 654709, 656787, 661372, 665521 and 665527) in the Superior Court of the State of California in and for the County of San Diego, and all members of the certified classes in those lawsuits.

It is further ORDERED that the Court directs that the settlement be consummated in accordance with the terms and conditions of the Agreement.

It is further ORDERED that the Amended Complaint and all claims and causes of action asserted therein are dismissed with prejudice with costs to be paid from the settlement fund in accordance with the terms of the Settlement Agreement.

It is further ORDERED that, in the event that the settlement does not become final (as more fully defined in

the Agreement) in accordance with the terms of the Agreement, then this Final Judgment and the Final Order shall be rendered null and void and be vacated, and the Agreement shall be rendered null and void in accordance with the provisions thereof.

It is further ORDERED that, without affecting the finality of the Final Order and this Final Judgment, the Court shall retain continuing jurisdiction over this action and the settling Parties (as more fully defined in the Agreement), including all members of the Settlement Class; the administration and enforcement of the settlement; and the benefits to the Settlement Class, including for such purposes as supervising the implementation, enforcement, construction, and interpretation of the Settlement Agreement.

It is further ORDERED that, subject and pursuant to the terms and conditions of the Agreement, Plaintiffs and all members of the Settlement Class are barred and permanently enjoined from prosecuting (in any forum) against Shell Oil Company and/or Hoechst Celanese Corporation any and all claims, demands, causes of action of every kind and nature, obligations, damages, losses, and costs, whether known or unknown, actual or potential, suspected or unsuspected, contingent or fixed, either arising out of or relating to any of the facts, transactions, actions, or conduct alleged in this action, or that were or could have been asserted or sought in the action, other than any past, present, or future claim for bodily injury (including wrongful death) and associated emotional distress and mental anguish.

It is further ORDERED that, in accordance with the above-described Application and the Funding Agreement

ferred to in the Agreement, the defendants shall pay Plaintiffs' Class Counsel, as attorneys' fees and expenses, the sum of $45 million, plus interest at the rate applicable to federal court judgments entered on July 31, 1995, for the period from July 31, 1995, until the earlier of July 31, 1996, or when paid.

It is further ORDERED that, in accordance with Section 25.1 of the Agreement and with the Funding Agreement referred to in the Agreement, the defendants shall pay the sum of $3,000.00 to each single Representative Plaintiff or Representative Plaintiff married couple.

It is further ORDERED, pursuant to Rule 54.02 of the Tennessee Rules of Civil Procedure, that the Court hereby DIRECTS the entry of this judgment as a final judgment based upon the Court's finding that there is no just reason for delay, notwithstanding the Court's retention of jurisdiction to oversee implementation and enforcement of the Agreement as set forth above, and the Court's continuing jurisdiction to provide for supplemental notice (and related proceedings) to potential members of the Settlement Class as to whom the Court previously received requests for exclusion from the Settlement Class.

Dated at Union City, Tennessee, this 17 day of November, 1995.

/s/ W. Michael Maloan
W. MICHAEL MALOAN,
CHANCELLOR

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TEXARKANA DIVISION

RICHARD R. RICHARD, JR., on behalf of himself and all others similarly situated,	§	
Plaintiffs,	§	CASE NO. 500 CV 008
vs.	§	
HOECHST CELANESE CHEMICAL GROUP, INC.; SHELL OIL COMPANY D/B/A SHELL CHEMICAL COMPANY; HOECHST CELANESE CORPORATION; and E.I. DUPONT DE NEMOURS & COMPANY,	§	
Defendants.	§	

SECOND AMENDED COMPLAINT

Plaintiff Richard R. Richard, Jr., on behalf of himself and all others similarly situated, submits this Second Amended Complaint against Defendants Hoechst Celanese Chemical Group, Inc., Shell Oil Company d/b/a Shell Chemical Company, Hoechst Celanese Corporation and E.I. DuPont de Nemours & Company (collectively "the Polybutylene Group"):

INTRODUCTION

1. This class action lawsuit is brought to recover damages for injury caused by the Polybutylene Group's

manufacture, promotion and sale of polybutylene for use in residential and commercial plumbing systems for potable water. Not only was polybutylene unsuitable for such use, but the Polybutylene Group knew their product was defective for this purpose. Nevertheless, the Polybutylene Group promulgated fraudulent misrepresentations in order to continue to produce and sell polybutylene systems without regard to the damage such systems would impose on unknowing purchasers. Plaintiffs bring the First through Fourth Causes of Action under the Racketeer Influenced and Corrupt Organization (RICO) statute, 18 U.S.C. §§ 1961 et seq.. The Fifth Cause of Action arises under Section 42(a) of the Lanham Act, 15 U.S.C. § 1125 to recover damages arising from the Polybutylene Group's misrepresentations in commercial advertising and promotion. The Sixth Cause of Action alleges violation of the Due Process Clause of the U.S. Constitution. The Seventh through Tenth Causes of Action sound respectively in conspiracy, strict liability, negligence and breach of implied warranties under Texas law.

JURISDICTION

2. The Court has subject matter jurisdiction pursuant to 18 U.S.C. § 1964(c) (RICO); 28 U.S.C. Section 1338 (Trademark Jurisdiction) in that this action arises, in part, under 15 U.S.C. § 1125(a) (Lanham Act); 28 U.S.C. § 1331 (Federal Question Jurisdiction) and 28 U.S.C. § 1367 (Supplemental Jurisdiction).

VENUE

3. Venue is proper in this district pursuant to 28 U.S.C. § 1391(b), because Plaintiff resides in this district

and a substantial portion of the events giving rise to the claims set forth in this action took place herein.

THE PARTIES

4. Plaintiff Richard R. Richard, Jr., (Richard), is an individual residing in the Eastern District of Texas who owns structures equipped with polybutylene plumbing. Richard has never participated in a polybutylene class action lawsuit in a court with competent personal and subject matter jurisdiction over him.

5. Defendant Hoechst Celanese Chemical Group, Inc., now known as Celanese, Ltd., (Celanese) is a limited partnership with its office in Dallas, Texas. At all material times, Celanese was authorized to conduct and did conduct business in Texas. Celanese's registered agent in Texas is CT Corporation System, 350 North St. Paul Street, Dallas, Texas 75201.

6. Defendant Shell Oil Company d/b/a Shell Chemical Company (Shell) is a Delaware corporation. At all material times, Shell was authorized to conduct and did conduct business in Texas. Shell's registered agent in Texas is CT Corporation System, 350 North St. Paul Street, Dallas, Texas 75201.

7. Defendant Hoechst Celanese Corporation, now known as HNA Holdings, Inc. (HNA) is a Delaware corporation. At all material times, HNA was authorized to conduct and did conduct business in Texas. HNA's registered agent in Texas is CT Corporation System, 811 Dallas Avenue, Houston, Texas 77002.

8. Defendant E.I. DuPont de Nemours & Company (DuPont) is a Delaware corporation. At all material times,

DuPont was authorized to conduct and did conduct business in Texas. DuPont does not maintain a registered agent or office for service of process in Texas and may be served through the Secretary of State, Statutory Documents Section, P.O. Box 12887, Austin, Texas 78711.

FACTS APPLICABLE TO ALL COUNTS

9. Polybutylene resin (polybutylene) is a type of plastic that is produced as a by-product of oil refining. In the late 1970's, Shell developed flexible pipes made of polybutylene which were promoted and marketed for residential and commercial potable water plumbing systems.

10. Joint fittings for polybutylene plumbing systems were made from resins developed by Celanese and DuPont. The resin developed by Celanese was marketed under the name "Celcon." DuPont's resin was sold as "Delrin."

11. The Polybutylene Group produced the materials used in the pipes, joints, fittings and resins that comprised polybutylene plumbing systems. In some instances, the Polybutylene Group promoted and/or marketed the components or systems themselves.

12. Polybutylene systems were sold to the mobile home industry, recreational vehicle industry, residential developers, plumbing contractors and individuals. Promoters of polybutylene systems claimed their product was superior to existing plumbing systems because it was lightweight, inexpensive, better able to withstand freezing temperatures, easier to install and purportedly would last fifty years.

13. However, despite such representations, hundreds of thousands of polybutylene systems developed leaks when, inter alia, they were exposed to chlorinated water such as most municipalities use.

14. In 1988, the plastic plumbing industry estimated that six million polybutylene systems had been installed in the United States. Such systems continued to be sold until approximately 1996.

15. By the early 1980s, the Polybutylene Group knew the polybutylene systems were failing and would continue to fail. Nevertheless, the Polybutylene Group continued to promote and sell its defective products.

PREVIOUS POLYBUTYLENE LITIGATION

16. Not surprisingly, the defective polybutylene systems spawned considerable litigation. Defendants fought class certification in polybutylene class action litigation for over a decade.

17. Then, in 1994, a sweetheart class action settlement was reached [in] a Texas state court action, *Beeman v. Shell Oil,* No. 93-47363, D.Ct., 16th Cir., Harris County, TX. The proposed settlement would have amply compensated plaintiffs' attorneys but sharply limited defendants' damages to a token amount for each unit of repair funding. When the state court rejected the settlement, the parties tried unsuccessfully to remove the case to Texas federal court.

18. While this was happening, another class action, Spenser v. Shell Oil, No. CV94-074, Greene Cty., (Ala. Cir. Ct.) was filed in Alabama. Several months later, the Spenser plaintiffs moved for class certification and approval

of a partial settlement with DuPont. Their motion was set for hearing on June 28, 1995.

19. On June 13, 1995, the Beeman counsel went to rural Tennessee and filed a new state court class action against the Beeman defendants. The new case was styled Cox v. Shell Oil, No. 18,844 (Tenn. Chanc. Ct., Obion Cty.). The same day Cox was filed, the Tennessee court certified Cox as a national polybutylene class action, ex parte, with Defendants' acquiescence. No hearing on class certification was ever conducted by the Tennessee chancery court.

20. As competing national class actions, Spenser and Cox engaged in an opt-out war and race to the courthouse. Spenser was set for trial on November 27, 1995.

21. In July 1995, a mere forty-five days after Cox was filed, the parties formalized an amicable settlement.

22. After reaching accord, the Cox litigants hurried preliminary court approval of the settlement, notice program, opt-out period and fairness hearing.

23. Only weeks before the fairness hearing, the Cox settlement was jeopardized by several hundred thousand opt-outs.

24. Just before the fairness hearing, the competing Spenser and Cox class actions met for mediation in California and reached a putative joint national settlement.

25. At about the same time, the Defendants settled the opt-out individual claims for amounts that did not reflect the amounts agreed to in the proposed settlement.

CLASS ALLEGATIONS

26. Plaintiff brings this action on behalf of himself as well as a class of similarly situated persons pursuant to Fed. R. Civ. P. 23. The Class is defined as follows:

> All Texas citizens, residents and entities authorized to do business in Texas that own plumbing systems in structures in Texas and elsewhere, in which there is polybutylene plumbing and over which Tennessee and Alabama courts lacked subject matter jurisdiction.
>
> All U.S. citizens and entities that were excluded from the settlement classes of Cox v. Shell Oil Co., No. 18,844 (Tenn. Chanc. Ct., Obion Cty.) and Spencer v. Shell Oil Co., No. CV94-074 (Greene Cty., Ala.) because defects in their polybutylene plumbing systems were defined as non-qualifying.
>
> All U.S. citizens and entities that own structures containing polybutylene plumbing systems and have never participated in a polybutylene class action in a Court of competent personal and subject matter jurisdiction.
>
> Excluded from the Class are: (1) All persons and entities that retained counsel to assert claims arising out of defects in polybutylene plumbing systems before this Complaint was filed; (2) All persons asserting claims for personal injury; (3) the Defendants, their parent, subsidiary, or affiliate organizations and all of their officers, directors, agents, servants and employees; (4) All persons and entities that timely opt out of this proceeding; and (5) the judge and his family.

27. This action is brought and may properly be maintained as a class action since the requirements of

numerosity, typicality, adequacy, predominance and superiority are satisfied.

28. Members of the Class and subclasses as defined herein in paragraph 26 are so numerous that joinder of all claims is impracticable.

29. The exact number and identities of all Class and subclass members is not known to Plaintiff and can only be ascertained through discovery. Nevertheless, Plaintiff is informed and believes that the Class includes millions of individuals.

30. There are numerous questions of law and fact common to the Class. Such common questions include, but are not Limited to:

The acts and practices of the Polybutylene Group in the practices described in paragraphs 1 through 29 above;

Whether the Polybutylene Group made misrepresentations in commercial advertising and the extent to which such misrepresentations were likely to influence purchasing decisions;

The extent to which the Polybutylene Group's misrepresentations in commercial advertising, if any, deceived or tended to deceive recipients;

The extent to which the Polybutylene Group's misrepresentations in commercial advertising, if any, were likely to injure plaintiffs;

Whether the Polybutylene Group engaged in fraudulent and illegal practices;

The extent to which 18 U.S.C. § 1964(c) is applicable to the activities of the Polybutylene Group and the existence of

an "enterprise" and a pattern of unlawful activity with respect to conspirators under that law;

Whether Polybutylene Group members committed numerous acts of mail fraud in furtherance of their scheme;

Whether Polybutylene Group members violated Texas common law and statutory provisions in a uniform and fraudulent scheme;

Whether the Cox (Tennessee) and Spenser (Alabama) state courts had proper personal and subject matter jurisdiction over members of the Class;

Whether putative class members were deprived of a meaningful opportunity to participate or opt-out of the Cox (Tennessee) and Spenser (Alabama) polybutylene class action litigation;

31. Common questions of law and fact exist as to all subclass members, and such common questions predominate over any questions affecting only individual subclass members. The questions of law and fact common to the subclass are, without limitation:

(a) Whether the Polybutylene Group marketed the PB system for potable water supply applications even though they knew or should have known that the system would deteriorate when exposed to chlorine commonly found in potable water;

(b) Whether the Polybutylene Group omitted material facts in the distribution and sale of the PB system about the defective performance and short life expectancy of the PB system;

(c) Whether the Polybutylene Group introduced the PB system into the stream of commerce and misrepresented its fitness for a particular purpose and suitability for its foreseeable use;

(d) Whether the Polybutylene Group knew or should have known that the PB system was fundamentally and chemically defective and would eventually cause damage to the Plaintiffs and other consumers, including subclass members;

(e) Whether the Polybutylene Group intentionally or negligently omitted material information concerning the PB system that was known at the time of the transactions, and that such omissions were intended to induce the Plaintiffs to act which, but for the omissions, the Plaintiffs would not have acted;

(f) Whether the Polybutylene Group intentionally or negligently represented that the PB system had sponsorship, approval, characteristics, uses, and benefits that it did not have;

(g) Whether the Polybutylene Group was negligent in ascertaining the truth or falsity of their statements concerning the quality and characteristics of their products; and

(h) Whether the Polybutylene Group conspired to promote the PB system even though they knew it was defective and unsuitable for use with potable water, and whether one or more of the Polybutylene Group members commenced a tort in furtherance of the conspiracy.

32. The representative Plaintiffs will fairly and adequately protect the interests of the members of the Class. The Plaintiffs' claims are coextensive with, and not

antagonistic to, the claims of the Class members. The Plaintiffs have retained counsel who are competent and experienced in class and complex litigation. No conflict exists between the Plaintiffs and the Class members because:

(a) The claims advanced by the Plaintiffs are typical of the claims of each member of the subclass they represent;

(b) The Plaintiffs' claims arise from the same course of conduct, and they are based upon the same legal theories, as the claims of all other Class members;

(c) The Plaintiffs and each member of the Class have a common interest in prevailing on the same legal claims;

(d) The types of damages incurred by the Plaintiffs are similar to those incurred by the members of the Class they represent;

(e) The claims of the Class are coextensive and may materially vary only in the degree of damages;

(f) The Plaintiffs and their counsel have the necessary financial resources to adequately and vigorously litigate this class action, are aware of their fiduciary responsibilities to the Class members, and are determined to diligently discharge those duties by vigorously seeking the maximum possible recovery for the Class.

In addition, Plaintiffs urge that:

(a) The prosecution of separate actions by or against individual members of the class would create a risk of

(i) Inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(ii) Adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(b) The party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(c) Where the object of the action is the adjudication of claims which do or may affect specific property involved in the action; or

(d) The questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and a class action is superior to the available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include:

(i) The interest of members of the class in individually controlling the prosecution or defense of separate actions;

(ii) The extent and nature of any litigation concerning the controversy already commenced by or against members of the class;

(iii) The desirability or undesirability of concentrating the litigation of the claims in the particular forum;

(iv) The difficulties likely to be encountered in the management of class action.

33. A class action is an appropriate method for the fair and efficient adjudication of this controversy. Class treatment can best secure the economies of time, effort and expense for all interested parties and the court system, promote uniformity, and accomplish the ends of equity and justice for the various subclass members with relatively small claims that might otherwise go unremedied.

34. The damages suffered by individual Class members may be relatively small, and the expense and burden of individual litigation makes it impossible for those Class members individually to redress the wrongs done to them.

35. The Plaintiffs' attorneys have already obtained extensive discovery from similar cases in other jurisdictions concerning liability and damages. Such discovery includes: (a) depositions from almost all of the Polybutylene Group's officers and employees involved with polybutylene research, development, promotion and management decisions; and (b) detailed investigations by a number of experts and the expert analysis of damages to thousands of structures.

36. The liability and damages issues may be tried at a near date in that these issues have been previously adjudicated on identical facts in foreign jurisdictions.

GENERAL ALLEGATIONS

37. Defendants, and others acted together in the development, promotion and marketing of the PB system.

38. The Polybutylene Group made material factual misrepresentations and omissions which constituted a producing cause of damages sustained by the Plaintiffs and the class members, in that:

(a) The Polybutylene Group marketed the PB system for potable water supply applications even though they knew or should have known the system would deteriorate when exposed to chlorine which is commonly found and in potable water;

(b) The Polybutylene Group omitted material facts about the defective performance and short life expectancy of the PB system;

(c) The Polybutylene Group introduced the PB system into the stream of commerce in Texas and elsewhere by materially misrepresenting that it was suitable for its foreseeable use;

(d) The Polybutylene Group intentionally or negligently concealed material negative information concerning the PB system that was known at the time of the transactions;

(e) The Polybutylene Group intentionally or negligently misrepresented that the PB system was of a particular standard, quality or grade when in fact, it was of another; and

(f) The Polybutylene Group intentionally or negligently misrepresented that the PB system had

sponsorship, approval, characteristics, uses, or benefits that it did not have.

39. Such misrepresentations and omissions were false in that:

(a) Polybutylene, in an application that allowed exposure to chlorine normally found in potable water systems, was fundamentally, chemically, and irreversibly defective in that it deteriorated and failed when exposed to chlorine;

(b) The Polybutylene Group knew that polybutylene was unsuited to applications involving exposure to chlorine which is normally formed [sic] in potable water systems;

(c) Despite their knowledge of polybutylene's unsuitability to potable water system applications, the Polybutylene Group represented that it was safe and suitable for such applications; and

(d) The Polybutylene Group willfully, knowingly, and intentionally or negligently placed an inherently defective product into the stream of commerce in Texas and elsewhere for pecuniary gain and in flagrant or negligent disregard of the Plaintiffs' and Class members' rights.

40. Further, Defendants took advantage of the lack of knowledge, ability, experience, or capacity of the Plaintiffs to know of the substantial, latent defects in the plumbing system or components thereof, and as such, took advantage of their lack of knowledge, ability, experience and capacity to a grossly unfair degree.

41. As a direct and proximate result of the misrepresentations and material omissions alleged above, the Polybutylene Group induced the Plaintiffs to purchase structures that contained inherently defective polybutylene plumbing systems.

42. Had the Polybutylene Group truthfully represented the nature of polybutylene to the Plaintiffs, the Plaintiffs would not have purchased structures containing polybutylene plumbing systems.

43. The PB system cracks, corrodes and leaks, and is not suitable for use as a potable water system because:

(a) Polybutylene pipe deteriorates when exposed to chlorine commonly found in potable water;

(b) The resin Celcon, and all fittings made from Celcon, corrode and fail when exposed to chlorine commonly found in potable water;

(c) The expansion and contraction caused by hot water commonly found in potable water systems accelerates fatigue and causes failure of the PB system fittings;

(d) The heat in the hot water supply found in potable water systems accelerates the deterioration of the PB system; and

(e) Polybutylene pipe cracks from crimp rings that are used to join the pipe because the crimp ring system renders it almost impossible for workmen to crimp the fittings with adequate but not excessive pressure.

44. The Polybutylene Group also made material omissions to code bodies, trade associations, governmental

entities, and Class members regarding problems with the polybutylene system.

45. The Polybutylene Group aggravated the effect of their omissions by making claims that the PB system was suitable for potable water plumbing when it was not, and that the PB system had a long service life, which it does not.

46. The Polybutylene Group intentionally omitted information they possessed concerning the inherent chemical defects of the PB system and of its short service life.

47. Manufacturers, code bodies, trade associations, governmental entities, builders and Class members were misled by these misrepresentations and omissions, with the result that the PB system has been widely used in residential plumbing and was used in the structures owned by the Plaintiffs and the class.

48. The misrepresentations and omissions were intended to induce manufacturers, code bodies, trade associations, governmental entities, builders and Class members to approve, promote or use the PB system.

49. As a direct and proximate result of the Polybutylene Group's conduct, the Plaintiffs and the Class members have suffered damages through the use of the PB system in their structures.

50. The Plaintiffs and the Class have suffered, and will continue to suffer, damages to their structures and improvements, as well as damage to the personal property contained therein. The Plaintiffs and the Class have incurred, and will continue to incur, expenses in repairing and/or replacing the PB system and the damage to their

structures, improvements, and personal property. The Plaintiffs and the Class also have incurred, and will continue to incur, expenses from loss of use of their property, such as for temporary lodging and meals, and have suffered and will continue to suffer loss of the use, benefit and enjoyment of their structures, and a reduction in the value of same.

51. The Plaintiffs have retained the undersigned counsel to represent them in this lawsuit and are obligated to pay reasonable attorneys' fees.

52. Questions of law and fact common to the Class, including the legal and factual issues relating to operation of the scheme described herein, and the liability and the nature of the relationships among the Polybutylene Group, predominate over any questions affecting only individual members.

53. A class action is superior to other available methods for the fair and efficient adjudication of this controversy: the Class is readily definable, and can be identified to a significant extent by discovery; prosecution of this case as a class action will eliminate the possibility of repetitious litigation and will provide redress for claims which otherwise may be too small to support the expense of individual, complex litigation against the defendant; there are no problems which would make this case difficult to manage as a class action.

CIVIL RICO SUMMARY

54. In connection with the activities giving rise to this action, the defendant acted with malice, intent, and

knowledge, and with a wanton disregard of the rights of named plaintiffs and the Class herein.

55. During relevant times herein, the "enterprise" described below was engaged in interstate commerce in that, inter alia, the polybutylene systems and components thereof which are the subject of the Polybutylene Group's scheme to defraud were used and transported in interstate commerce.

56. During relevant times herein, in connection with the activities giving rise to this action, each member of the Polybutylene Group conspired with each of the other conspirators to engage in the various activities set forth herein, agreed to participate in the operation of the conspiracy to defraud the named plaintiffs and Class members herein, and aided and abetted one another in these activities, all as proscribed as set forth further herein below.

57. As set forth herein, during the relevant times, and in furtherance of and for the purpose of executing the scheme and artifice to defraud, the members of the Polybutylene Group on numerous occasions used and caused to be used mail depositories of the United States Postal Service by both placing and causing to be placed mailable matters in said depositories and by removing and causing to be removed mailable matter from said depositories. Each such use of the U.S. mails in connection with the scheme and artifice to defraud constituted the offense of mail fraud as proscribed and prohibited by 18 U.S.C. §§ 2, 1341. These instances of mail fraud were a substantial factor in the sequence of responsible causation; and the injuries to plaintiffs and the class were reasonably foreseeable or anticipated as a natural consequence of the mail

fraud; and plaintiffs and the class suffered damages by reason of the mail fraud.

FIRST CLAIM FOR RELIEF –
VIOLATION OF FEDERAL LAW – 18 U.S.C. § 1962(a)

58. The allegations of paragraphs 1 through 57 are incorporated herein by reference as if fully set forth.

59. The Plaintiff and each class member is a "person" within the meaning of 18 U.S.C. § 1961(3) and 1964(c).

60. The members of the Polybutylene Group are "persons" within the meaning of 18 U.S.C. §§ 1961(3) and 1962(a).

61. Through agreements to provide polybutylene systems and the components thereof to purchasers and through contractual arrangements and joint promotional activity for marketing the polybutylene systems, each member of the Polybutylene Group formed an association-in-fact with the other conspirators which constitutes an "enterprise" engaged in illegal activities affecting interstate commerce pursuant to 18 U.S.C. §§ 1961(4) and 1962(a).

62. Each of the conspirators was associated with this "enterprise" and did use or invest income derived from a pattern of unlawful activity under 18 U.S.C. §§ 1961(1) and (5) to operate, maintain control of, and maintain an interest in the enterprise.

63. These unlawful activities included multiple instances of mail fraud in the issuance of false and deceptive commercial advertising and promotion, multiple

instances of mail fraud in the issuance of false and deceptive product description to consumers and multiple instances of mail fraud in the receipt of sums representing payment received for polybutylene systems and components thereof, all in violation of 18 U.S.C. §§ 2, 1341.

(a) Defendants perpetrated specific acts of mail and wire fraud including, without limitation, the following:

(i) Shell mailed a letter, dated August 6, 1987, on Shell letterhead, from Scott J. Elstad, Manager Market Development, Polybutylene Business Center, to Richard Church, Executive Director, PPFA, enclosing a draft of a manual on polybutylene pipe which contains fraudulent misrepresentations concerning polybutylene systems and fittings. The letter instructs Mr. Church to "forward [the section on limitations on fittings] to DuPont and Celanese for their review and *written approval* . . . " (Emphasis added.) By faxed communication, DuPont reviewed and approved of the letter in furtherance of the fraud and conspiracy. Shell brought DuPont into the conspiracy during the final two years it was promoting polybutylene systems because of DuPont's chemical expertise and the large profits to be made from false and misleading promotion of polybutylene systems;

(ii) Shell mailed letters with attachments on November 5, 1986, on Shell letterhead, from M.J. O'Brien, Sales Manager, Polybutylene Business Center. An attached memo states that "the following letter was sent to U.S. Brass, Bow, Vanguard, EPC and Wesflex." The letter and attached study of sales potential for polybutylene plumbing pipe in manufactured housing contains blatant misrepresentations and fraudulent statements about polybutylene systems;

(iii) Celanese mailed a note in May 1978 on Celanese letterhead to M. Scott Elstad (Shell's Manager of Market Development), enclosing an April 1978 bulletin on the properties of Celcon, the registered trademark of the Celanese Corporation's polybutylene. The bulletin contains numerous fraudulent statements and misrepresentations concerning polybutylene;

(iv) Celanese mailed a letter in April 1981 on Celanese letterhead from John Pope, Celcon Market Development Supervisor, to a customer, W.J. McGlinchy, Western Products Company, apparently in response to Mr. McGlinchy's concerns about polybutylene systems. The letter contains several false and misleading statements about polybutylene systems, including "there is no evidence available which suggest that chlorinated water has resulted in premature part failure;"

(v) Celanese mailed a computer form-letter dated July 26, 2985 [sic], on Celanese letterhead, signed "Regards, Celanese Engineering Resins, S.J. Iannelli, Industry Manager, Fluid/Material Handling to a merge list of 17 individuals and businesses. The letter contains false and misleading information and material omissions about the use of polybutylene in plumbing applications (*see* Exhibit "E" attached hereto);

(vi) Shell mailed a letter on May 16, 1980, to Keith Swinehart of Vanguard Plastics enclosing the completed artwork for "downsized versions of our 'Polybutylene Plumbing Pipe Runs Circles Around the Competition' advertisements." The advertisements contain false and misleading representations;

(vii) Celanese mailed a letter on January 6, 1987, signed by Chuck A. Calhoun, Senior Sales Representative,

to Bill Brennan of Plastamatic Corporation which said, among other false and misleading statements that "we are aware of no serious problems" in connection with polybutylene insert fittings for the mobile home and RV markets;

(viii) Shell's employee, A.H. Schroer, used the telephone on October 21, 1982, to tell Celanese's employee Diane Datson, that he had tried to check on the status of research work on the use of Celcon (Celanese's polybutylene product), but "they just want to duck that whole issue;"

(ix) Shell sent a letter via certified mail (return receipt requested) on May 14, 1987, to a distribution list of more than a dozen plumbers and wholesalers that contained false and misleading statements and omissions. The letter was signed by L.A. Petershagen, Manager, Polybutylene Business Center, and represented that there had been "a *few* isolated instances . . . [of] . . . premature oxidation failure in polybutylene pipe." (Emphasis added.) The letter further asserted that recent laboratory data "did not change the outlook for continuing satisfactory service under normal conditions." These statements are false and misleading. DuPont approved the contents of this letter and was informed of numerous similar letters to small businessmen whose purpose was to deceive wholesalers and plumbers about the defects of polybutylene systems by omissions and false or misleading representations;

(x) The CBS News Documentary "60 Minutes" covered the widespread failure of polybutylene systems in an episode sardonically entitled, "The Best Thing Since Sliced Bread." The title derives from Defendants'

wide-spread promotional campaign advertising polybutylene systems as "the best thing since sliced bread." A significant portion of the 60 Minutes expose focused on debilitating problems that the failure of its polybutylene systems caused the City of San Antonio, Texas. The video of the 60 Minutes broadcast illustrates what the documents referred to herein establish – that Defendants engaged in specific unlawful acts as part of a deliberate conspiracy to defraud the public. (A copy of the 60 Minutes broadcast is provided herewith as Exhibit "A".)

64. The purpose of the Polybutylene Group's and conspirators' association-in-fact was to fraudulently advertise and sell polybutylene systems that they knew to be unsuitable for potable water. This association-in-fact by the Polybutylene Group and other conspirators enabled them to sell millions of defective polybutylene systems that directly caused injury to Plaintiff and other members of the Class.

65. The association-in-fact had a common or shared purpose; that is, to sell polybutylene systems and thereby defraud members of the public. The scheme had a distinct division of labor and continued as a unit, with a core membership, over a substantial period of time and was an ongoing organization established for an economic motive.

66. Each member of the Class owns one or more structures containing a polybutylene system.

67. The Polybutylene Group's promotion and sale of polybutylene systems, including fraudulent and false statements relied on by plaintiff and other members of the Class, were intended to and did assure the plaintiff and Class members that the polybutylene systems were suitable for potable water plumbing systems.

68. The Polybutylene Group's false and fraudulent promotion of polybutylene systems furthered the purposes of the enterprise described herein, that is, to generate additional sales of the defective polybutylene systems and permit the Polybutylene Group members to reinvest profits from defrauded Class members in perpetuating the enterprise. The Polybutylene Group members participated in a massive fraud, an illegal and profitable scam, which took advantage of the plaintiffs' and the Class' reasonable reliance on the apparent legitimacy of the product.

69. These activities of the association-in-fact form a pattern, continuous in nature, which consists of multiple unlawful acts directed to the named Plaintiff and to each Class member. The illegal activities of the Polybutylene Group persisted over an extended period of time. Each fraudulent promotional activity and each act of mail fraud was an act in furtherance of the conspiracy for which the Polybutylene Group members are liable. The reliance of the plaintiff and the members of the class on falsehoods and omission of accurate information concerning the polybutylene system's defects in the promotional material was reasonable and justified.

70. These activities of the Polybutylene Group and other conspirators entailed multiple instances of mail fraud consisting of intentional mail fraud intended to induce, and inducing, plaintiffs and the class to purchase defective products in violation of 18 U.S.C. §§ 2, 1341.

71. Through the use of this illegal and fraudulent scheme, and through its efforts to operate and maintain the enterprise described herein and to maintain the conspiracy to sell defective products and create illegal profits, the defendant and other conspirators caused

Plaintiff and Class members to provide them with considerable funds to purchase polybutylene systems.

72. Members of the Polybutylene Group retained these unlawfully gained funds and reinvested and used those funds in their operations in violation of 18 U.S.C. §§ 2, 1962(a).

73. Plaintiffs and all class members have been injured in their property by reason of the operation of the enterprise in this unlawful manner.

WHEREFORE, Plaintiffs seek judgment against the Polybutylene Group, on behalf of themselves and the Class herein, consisting of their actual damages suffered as a result of the illegal acts set forth herein, plus treble damages, plus reasonable costs and attorneys' fees, plus pre and post judgment interest, plus such further relief as this Court deems appropriate.

SECOND CLAIM FOR RELIEF – VIOLATION OF FEDERAL LAW – 18 U.S.C. § 1962(c)

74. The allegations of paragraphs 1-73 are incorporated herein by reference as if fully set forth.

75. The Plaintiff and each Class member is a "person" within the meaning of 18 U.S.C. §§ 1961(3) and 1964(c).

76. The Polybutylene Group and each of the coconspirators are "persons" within the meaning of 18 U.S.C. §§ 1961(3) and 1962(c).

77. The association-in-fact described in the "First Claim for Relief" above was an "enterprise" within the meaning of 18 U.S.C. §§ 1961(4) and 1962(c), which

enterprise was engaged in, and the activities of which affect, interstate commerce.

78. Members of the Polybutylene Group were associated with the enterprise and participated in its management and operation by directing its affairs and by formulating and promulgating intentional or negligent misrepresentations in an effort to boost sales. They participated, directly and indirectly, in the conduct of the enterprise's affairs through a pattern of unlawful activity under 18 U.S.C. § 1961(1), consisting of multiple acts of mail fraud, in violation of 18 U.S.C. §§ 3, 1341.

79. The unlawful activity described in the foregoing paragraphs consists of multiple instances of mail fraud in violation of 18 U.S.C. §§ 2, 1341, including, inter alia, issuance of illegal, deceptive and fraudulent commercial advertising and promotion.

WHEREFORE, plaintiffs seek judgment against the Polybutylene Group on behalf of themselves and the Class herein, consisting of their actual damages suffered as a result of the illegal acts set forth herein, plus treble damages, plus reasonable costs and attorneys' fees, plus pre and post judgment interest, plus such further relief as this Court deems appropriate.

THIRD CLAIM FOR RELIEF – VIOLATION OF FEDERAL LAW – 18 U.S.C. § 1962(d)

80. The allegations of paragraphs 1-79 are incorporated herein by reference as if fully set forth.

81. The Plaintiff and each member of the Class are "persons" within the meaning of 18 U.S.C. §§ 1961(3) and 1964(c).

82. The Polybutylene Group and each of the other conspirators are "persons" within the meaning of 18 U.S.C. §§ 1961(3) and 1962(d).

83. The association-in-fact described in the "First Claim for Relief" above was an "enterprise" within the meaning of 18 U.S.C. §§ 1961(4) and 1962(a), which enterprise was engaged in, and the activities of which affect interstate commerce.

84. The Polybutylene Group and each of the other conspirators were associated with the enterprise described herein, and conspired within the meaning of 18 U.S.C. § 1962(d) to violate § 1962(a).

85. The Polybutylene Group and the other conspirators conspired to use or invest income derived from a pattern of unlawful activity under 18 U.S.C. § 1961(1) to operate, maintain control of, and maintain an interest in the enterprise and have done so through a pattern of unlawful activity including under 18 U.S.C. § 1961(1), inter alia, multiple instances of mail fraud in violation of 18 U.S.C. §§ 2, 1341.

86. The Plaintiff and each Class member has suffered injury to his property within the meaning of 18 U.S.C. § 1964(c) by reason of the commission of overt acts constituting illegal activity in violation of 18 U.S.C. §§ 1961(1), 1962(d).

WHEREFORE, Plaintiff seeks judgment against the Polybutylene Group, on behalf of himself and the Class herein, consisting of their actual damages suffered as a result of the illegal acts set forth herein, plus treble damages, plus reasonable costs and attorneys' fees, plus

pre and post judgment interest, plus such further relief as this Court deems appropriate.

FOURTH CLAIM FOR RELIEF –
VIOLATION OF FEDERAL LAW – 18 U.S.C. § 1962(d)

87. The allegations in paragraphs 1-86 are incorporated herein by reference as if fully set forth.

88. The Plaintiffs and each Class member are "persons" within the meaning of 18 U.S.C. §§ 1961(3) and 1964(c).

89. The Polybutylene Group and each other conspirator are "persons" within the meaning of 18 U.S.C. §§ 1961(3) and 1962(d).

90. The association-in-fact described in the "First Claim for Relief" above was an "enterprise" within the meaning of 18 U.S.C. §§ 1961(4) and 1962(c), which enterprise was engaged in, and the activities of which affect, interstate commerce.

91. The Polybutylene Group was associated with and participated in the operation of the enterprise and conspired within the meaning of 18 U.S.C. § 1962(d) to violate 18 U.S.C. § 1962(c). The members of the Polybutylene Group conspired with the other conspirators to conduct or participate, directly or indirectly, in the conduct of the affairs of the enterprise in relationship to the Class and to named plaintiff, through a pattern of unlawful activity, including under 18 U.S.C. § 1961(1), inter alia, multiple instances of mail fraud in violation of 18 U.S.C. §§ 2, 1341.

92. The Plaintiff and each Class member has suffered injury to his property within the meaning of 18

U.S.C. § 1964(c) by reason of the commission of overt acts constituting illegal activity in violation of 18 U.S.C. §§ 1961(1), 1962(d).

WHEREFORE, the Plaintiff seeks judgment against the Polybutylene Group on behalf of himself and the Class herein, consisting of their actual damages suffered as a result of the illegal acts set forth herein, plus treble damages, plus reasonable costs and attorneys' fees, plus pre and post judgment interest, plus such further relief as this Court deems appropriate.

FIFTH CLAIM FOR RELIEF – VIOLATION OF SECTION 43(a) OF THE LANHAM ACT

93. The allegations of paragraphs 1 through 92 are incorporated herein by reference as if fully set forth.

94. The Polybutylene Group engaged in a conscious, intentional and systematic pattern of false and misleading representations concerning the polybutylene system to the damage of the Plaintiff and the Class herein.

95. The Polybutylene Group promulgated false statements concerning the nature, characteristics and qualities, including but not limited to the physical and chemical properties; standard, quality or grade; and uses and benefits of the polybutylene system. In addition to being factually false, the statements were framed in such a way as to create a misleading impression of the strength and durability of the polybutylene system. The Polybutylene Group also failed to disclose critical facts, such as the rapid deterioration of polybutylene when exposed to chlorine in levels usually present in potable water.

96. These false representations were made in connection with commercial advertising or promotion of the polybutylene system in a conscious effort to increase sales. The Polybutylene Group knew the representations were false and misleading and did not reflect current understanding of the physical properties of the polybutylene system.

97. The misrepresentations actually deceived the Plaintiff and other members of the Class.

98. The misrepresentations made by the Polybutylene Group were intended to convince potential purchasers that the polybutylene system was superior to alternative potable water plumbing systems. Thus the misrepresentations were designed to influence purchasing decisions and for that reason were likely to do so.

99. Plaintiffs and other members of the Class were actually injured by the misrepresentations of the Polybutylene Group. It was highly likely that such misrepresentations would cause damage to persons who owned structures containing polybutylene systems because when plumbing systems in residential or commercial buildings leak, damage to property is common.

100. The misrepresentations of the Polybutylene Group were made in a commercial context.

101. These violations caused plaintiffs to suffer actual damages.

WHEREFORE plaintiffs seek judgment against the Polybutylene Group, on behalf of themselves and the Class herein, for all damages sustained by the Plaintiff and members of the Class as a result of the acts complained of herein, and that such damages be trebled because of the

wilful acts described herein in disregard of the known rights of plaintiff and members of the Class. Plaintiff further requests that each member of the Polybutylene Group be required to account to Plaintiff for any and all gains, profits and advantages derived from the activities complained of in this action and be assessed punitive damages for malicious, wilful and reckless disregard of the rights of others. Plaintiff also requests that the Polybutylene Group be required to pay to Plaintiff all of his litigation expenses, including reasonable attorney fees and the costs of this action, and such other and further relief as this Court deems appropriate.

SIXTH CLAIM FOR RELIEF – VIOLATION OF THE DUE PROCESS CLAUSE OF THE U.S. CONSTITUTION

102. The allegations of paragraphs 1 through 101 are incorporated herein by reference as if fully set forth.

103. The putative national class action settlements in Cox and Spencer purport to deny plaintiff and other members of the Class an opportunity to litigate their claims against the Polybutylene Group.

104. Cox and Spencer, however, do not bar this action because the state courts that adjudicated those actions lacked personal or subject matter jurisdiction over Plaintiff and this Class.

105. Tennessee and Alabama, through "Door Closing Statutes" or via decisional law interpreting due process limits on jurisdiction, lacked personal jurisdiction and subject-matter jurisdiction over all nonresident causes of action, which seek to recover for damage to structures located outside Tennessee and Alabama.

106. As Defendant Shell Oil Company successfully argued in Case No. 95-CP-10-1948 in the Court of Common Pleas, Ninth Judicial Circuit, County of Charleston, State of South Carolina, another polybutylene class action, "Under the door closing statute, the Court does not have subject matter jurisdiction over cases involving foreign Plaintiffs suing foreign defendants over causes of action not arising in this state."

107. Tennessee has a Door Closing Statute which is similar to South Carolina's and which similarly bars the Tennessee Court's authority to adjudicate claims against foreign corporations arising from activities outside the state. Counsel for Defendant Shell concealed from the *Cox* court the fact that Defendant Shell urged in the South Carolina litigation that the Door Closing Statute divested the South Carolina Court of subject matter jurisdiction for all non-resident claims.

108. In the South Carolina polybutylene class action, Defendant Shell successfully persuaded the Court to hold, "This Court cannot assert jurisdiction over the claims of non-resident potential class members under SCRCP 23 if claims do not arise in South Carolina or whose property at issue is not situated within this state."

109. For the same reasons Defendant Shell established in South Carolina, the Tennessee (*Cox*) Court and the Alabama (*Spencer*) Court lacked subject-matter jurisdiction and personal jurisdiction over the Plaintiffs herein, who, for due process purposes, were strangers to the *Cox* and *Spencer* cases. However, Shell's counsel in *Cox* urged that the Tennessee Court properly had subject matter jurisdiction over the putative national settlement class, including non-resident class members owning structures

outside Tennessee, and in spite of Tennessee's Door Closing Statute. At the same time, Shell's counsel argued the opposite in South Carolina.

110. Since the Plaintiffs are not residents of Tennessee or Alabama, under the respective "Door Closing Statutes" or relevant decisional law, the Tennessee Court (*Cox*) and the Alabama Court (*Spencer*) lacked jurisdiction over the subject-matter of this litigation, which includes damage to structures located outside Tennessee and Alabama.

111. Upholding Shell Oil Company's argument on the Door Closing Statute to limit the claims of the purported class, the South Carolina Court stated, "Failure to meet the requirements of the Door Closing Statute deprives the Court of subject matter jurisdiction over the claims of nonresident punitive (sic) class members." Counsel for Shell concealed from the South Carolina Court the fact that it advanced a conflicting argument before the *Cox* Court.

112. The Plaintiffs and Class members herein are not bound by the *Cox* and *Spencer* judgments since the respective Tennessee and Alabama Courts lacked subject-matter jurisdiction, and the requirements of due process dictate that the relevant foreign judgments are not entitled to full faith and credit.

113. Plaintiffs and class members herein did not have a meaningful opportunity to participate or opt-out of the Tennessee and Alabama "polybutylene" litigation.

114. Concerning South Carolina's Door Closing Statute, Defendant Shell successfully urged that the statute, " . . . by its terms . . . does not allow actions by non-residents against corporations not incorporated in

South Carolina except in two situations: (1) where the cause of action arises in South Carolina; or (2) where the subject of the action is situated within South Carolina."

115. Plaintiffs and class members herein did not consent to the foreign judgments in Tennessee and Alabama, and thus these judgments cannot be binding on claimants herein without offending due process.

116. The South Carolina Court succinctly articulated its conclusion, "The Door Closing Statute divests this Court of subject matter jurisdiction over foreign claims by non-resident Plaintiffs against defendants organized or existing under the laws of a state other than South Carolina."

117. By the putative, national class adjudications in Tennessee and Alabama, claimants herein were deprived of a full and fair opportunity to litigate their claims, and thus were deprived due process of law.

118. Since the Tennessee and Alabama judgments were rendered without judicial jurisdiction over the subject-matter of the instant product-liability claims, the decisions of those Courts are void as to the claimants in this case. Those judgments, by definition were rendered without any claim of jurisdiction for non-qualifying leaks.

119. The Tennessee and Alabama judgments did not comply with due process requirements for the claimants herein, and therefore these judgments are not entitled to full faith and credit.

120. To the extent Defendants herein will seek to enforce, by full faith and credit, the foreign judgments against plaintiffs herein, this court has the duty to inquire and to closely scrutinize the underpinnings of a foreign

court's assertion of jurisdiction over non-resident plaintiffs and their claims.

121. In its Order Denying Summary Judgment on the full faith and credit question, the South Carolina Court noted, "In the context of a class action, a state Court may only exert jurisdiction over a non-resident by providing due process in its own proceeding." The Court continued, "Any interested party may collaterally attack a judgment on the ground of lack of jurisdiction at any time."

122. Addressing due process concerns of a single, giant settlement class, a la *Cox* and *Spencer,* the United States Supreme Court stated:

> The adequacy inquiry under Rule 23(a)(4) serves to uncover conflicts of interest between named parties and the class they seek to represent. (Citation omitted). "[A] class representative must be part of the class and possess the same interest and suffer the same injury as the class members." (Citation omitted).
>
> As the Third Circuit pointed out, named parties with diverse medical conditions sought to act on behalf of a single giant class rather than on behalf of discrete subclasses. In significant respects, the interests of those within the single class are not aligned.
>
> * * *
>
> The settling parties, in sum, achieved a global compromise with no structural assurance of fair and adequate representation for the diverse groups and individuals affected. Although the named parties alleged a range of complaints, each served generally as representative for the

whole, not for a separate constituency. In another asbestos class action, the Second Circuit spoke precisely to this point:

> Where differences among members of a class are such that subclasses must be established, we know of no authority that permits a court to approve a settlement without creating subclasses on the basis of consents by members of a unitary class, some of whom happen to be members of the distinct subgroups. The class representatives may well have thought that the Settlement serves the aggregate interests of the entire class. But the adversity among subgroups requires that the members of each subgroup cannot be bound to a settlement except by consents given by those who understand that their role is to represent solely the members of their respective subgroups. (Citation omitted). *Amchem Products. Inc. v., Windsor,* 521 U.S. 591, 117 S. Ct. 2231, 138 L.Ed.2d 689 (1997).

123. The *Cox* and *Spencer* courts did not use subclasses to align interests of class members. The *Cox* preliminary certification order, dated June 13, 1995, only contained conclusory findings as to the Rule 23 criteria:

> The court finds that the requirements for certifying a class under Rule 23 are met. The requirement as to numerosity is met. Plaintiff alleges that as many as six million homes have polybutylene plumbing systems. Joinder of these claims is therefore impracticable. Since the same issues of fact and law arise as to defendants' defective product, commonality of the issues exists. Plaintiff's claim, like those of all other class members, arises from defendants'

> allegedly defective product and their failure to disclose material information. The typicality requirement is satisfied. Finally, the Court is satisfied that plaintiff, who has retained counsel with extensive experience prosecuting class actions, including consumer class actions, will be a fair and adequate representative of the class.
>
> The questions of law and fact which are common to the members of the class in this case predominate over any questions that affect only individual members. Furthermore, a class action suit is the fairest and most efficient means of adjudicating this case. Accordingly, the Class satisfies all requirements for certification under Rule 23.

124. In contrast to the exhaustive certification analysis required by *Amchem Prod. Inc. v. Windsor* 521 U.S. 591, 117 S. Ct. 2231, 138 L.Ed.2d 689 (1997), the *Cox* Court's conclusory holding in favor of certification is formed in three paragraphs of its order dated November 17, 1995, relying upon the findings in the preliminary order:

> 35) The Court previously found the requirements of Rule 23 of the Tennessee Rules of Civil Procedure were met and certified a nationwide class for litigation and trial purposes in the Order of National Class Certification. While such certification was and is contested by the defendants, they have agreed to class certification for settlement purposes, to promote a comprehensive, class wide resolution of polybutylene pipe litigation.
>
> 36) The numerosity, typicality, commonality, and adequacy requirements of Rule 23.01 of the Tennessee Rules of Civil Procedure are satisfied

> as to the Settlement Class in connection with the Settlement in this case.
>
> * * *
>
> 4.) Pursuant to Rule 23.01, Rule 23.02, and Rule 23.03 of the Tennessee Rules of Civil Procedure, the Court confirms the certification of the Settlement Class provided in the Preliminary Approval Order and maintains such certification for purposes of final approval of the settlement.

125. The above conclusory assertions in the preliminary and final orders do not satisfy *Amchem's* requirements. The *Cox* court never evaluated the adequacy of the named Plaintiffs to represent the diverse interests in the class, did not identify and compare the common and uncommon questions, and relied purely on conclusory recitals. The failure to use subclasses resulted in inadequate representation and created conflicts of interest among class representatives.

126. In *Cox* and *Spencer*, like *Amchem*, the only common and predominant issues were shared exposure and plaintiffs' interest in the settlement. The *Cox* and *Spencer* final orders reflect that each of these courts relied upon the wrong factors in approving the classes. The primary defect of the *Cox* and *Spencer* classes is the failure of the parties to account for the great differences in circumstances among the class members.

127. The *Cox* and *Spencer* courts failed to account for the conflict between current and future claimants. The *Cox* and *Spencer* orders purport to settle the claims of plaintiffs that may not yet know that their units contain polybutylene, or those who have no apparent damage. These plaintiffs had their claims compromised without

their knowledge. The *Cox* and *Spencer* Plaintiffs, who knew they had problems with polybutylene plumbing systems, prejudiced future claimants by creating limitation periods within the settlement agreement which the defendants will use to bar future claims.

128. For due process to exist as to absent class members, the record must reflect that counsel zealously represented the class members at all times. An adequate representative, vigorously prosecuting an action, without conflict, is the cornerstone of adequate representation. Class representatives in *Cox* and *Spencer* failed to properly value the class claims, either individually or on a class wide basis.

129. Due process requires that absent class members receive notice of the proceedings, and be given a meaningful opportunity to participate and to opt out. If plaintiffs did not receive timely notice of the *Cox* and *Spencer* proceeding, they did not have the opportunity to litigate whether they should be subject to the jurisdiction of the Tennessee and Alabama state courts. WHEREFORE plaintiffs request that the Polybutylene Group, and each and all members thereof, be preliminarily and permanently enjoined from directly or indirectly invoking Cox and Spencer to bar the Plaintiff and other members of the Class from asserting their rights to recover damages caused by the polybutylene system.

SEVENTH CLAIM FOR RELIEF – CONSPIRACY

130. The allegations of paragraphs 1 through 129 are incorporated herein by reference as if fully set forth.

131. Defendants at all relevant times knew that the polybutylene system was not suitable for potable water and would accordingly fail, necessitating repair or replacement and causing damage to structures and their contents, resulting in loss of use and enjoyment thereof and diminution in the value thereof.

132. Notwithstanding said knowledge, defendants combined together for the purpose of promoting the use of the polybutylene plumbing system for potable water supply site-built structures, suppressing information as to the unsuitability of the polybutylene system, and asserting positive claims as to polybutylene systems that they knew were false.

133. In furtherance of the conspiracy, the defendants undertook a course of tortious conduct by promulgating fraudulent misrepresentations concerning the polybutylene system, for example:

(a) Defendants failed to disclose material facts about the performance and life expectancy of the polybutylene system, and affirmatively misrepresented the life expectancy and performance characteristics of the polybutylene system;

(b) Defendants introduced the PB system into the stream of commerce by materially misrepresenting that it was suitable for its foreseeable use when defendants knew in fact it was not safe and suitable and did not meet reasonable consumer expectations;

(c) Defendants fraudulently failed to disclose information concerning the polybutylene system which was known at the time of the transactions, and such failure to

disclose was intended to induce consumers into a transaction in which the consumers would not have entered had the information been disclosed;

(d) Defendants fraudulently represented that the polybutylene system was of a particular standard, quality or grade, when in fact, it was another; and:

(e) Defendants fraudulently represented that the PB system had sponsorship, approval, characteristics, uses and benefits that it did not have.

EIGHTH CLAIM FOR RELIEF – STRICT LIABILITY

134. The Plaintiffs reallege paragraphs 1 through 133.

135. The Polybutylene Group designed, manufactured, assembled and sold, or otherwise introduced into the stream of commerce materials used in components of the system, components of the system, or the polybutylene system as a whole.

136. The PB system, its components, or materials used in components of the system reached ultimate consumers, such as the Plaintiffs, in substantially the same condition in which the polybutylene Group introduced them into the stream of commerce.

137. By introducing materials, components or the polybutylene system into the stream of commerce, the Defendants misrepresented that these items or the system were safe and suitable for its foreseeable use.

138. The Polybutylene Group made these material misrepresentations or omissions at the same time they promoted the alleged advantages and suitability of their

materials, components and the polybutylene system. Thus, the Polybutylene Group knowingly concealed the problems and defects of the polybutylene system.

139. The PB system was utilized in potable water plumbing systems in a manner intended and reasonably foreseeable by the Polybutylene Group.

140. The PB system was inherently defective and was a producing cause of Plaintiffs' damages.

141. Thus, the Polybutylene Group is strictly liable for damages herein, under §402A, Restatement of Torts, 2nd, as adopted by the Supreme Court of Texas.

NINTH CLAIM FOR RELIEF – NEGLIGENCE

142. The Plaintiffs reallege paragraphs 1 through 141.

143. The Polybutylene Group owed a duty to consumers, including the Plaintiffs and the Class, to adequately inspect and test the PB system and give adequate warnings regarding limitations on the use of the PB system.

144. The Polybutylene Group further owed a duty to exercise reasonable care in the design and manufacture of consumer products to ensure such were suitable for the reasonably foreseeable end-uses by consumers.

145. During the course of promoting and marketing the PB system, the Polybutylene Group negligently made material misrepresentations and omissions that the PB system, its components, and materials were suitable for potable water plumbing and had a long service life.

146. The Polybutylene Group breached their duty to adequately inspect and test the PB system, and further breached their duty of reasonable care to ensure the polybutylene system, its components, and materials were suitable for the foreseeable, intended uses by consumers.

147. The Polybutylene Group negligently omitted material information they possessed concerning the inherent defects of the PB system, and its short service life.

148. The Polybutylene Group members intended or reasonably could have foreseen or expected that their misrepresentations would be relied upon, and they were in fact relied upon, by customers, code bodies, trade associations, governmental entities, suppliers, the public at large, the Plaintiffs, and the other Class members.

149. As a direct and proximate result of the Polybutylene Group's negligence, the PB system was used in the structures of the Plaintiffs and the other Class members.

150. The Polybutylene Group's actions were either intentional or were performed with knowing disregard for the truth, or reckless indifference to the rights of the Plaintiffs and the other Class members.

151. As a direct and proximate result of the Polybutylene Group's negligent acts, the Plaintiffs and the other Class members have sustained compensable damages.

TENTH CLAIM OF RELIEF – BREACH OF IMPLIED WARRANTIES

152. The Plaintiffs reallege paragraphs 1 through 151.

153. The Polybutylene Group held themselves out to the general public as having knowledge and skills particular to the business of furnishing products or materials used in manufacturing components suitable for potable water plumbing systems.

154. The Polybutylene Group impliedly warranted and represented that the PB system was merchantable and reasonably fit for the ordinary purposes for which it was intended.

155. The Polybutylene Group breached this implied warranty because the PB system is not, and has never been, merchantable or reasonably fit for ordinary use; instead it is inherently defective.

156. The PB system was specifically engineered, designed manufactured, sold, and intended for water supply plumbing use, and the Polybutylene Group advertised and marketed the PB system for such purposes.

157. The Polybutylene Group knew that the Plaintiffs and the class were relying on the Polybutylene Group's skill and judgment to select and furnish materials and plumbing systems suitable for their intended purpose.

158. The Polybutylene Group knew or should have known that the PB system would be installed in the structures owned be [sic] the Plaintiffs and the Class.

159. The Plaintiffs and the Class relied on the Polybutylene Group's skill, judgment, and implied warranty that the goods were fit for potable water plumbing systems, yet the PB system was not suitable for this intended use.

160. As a direct result of the Polybutylene Group's breach of implied warranties of merchantability and fairness, the Plaintiffs and the other Class members have sustained compensable damages.

161. Plaintiffs demand trial by jury. WHEREFORE, premises considered, Plaintiffs pray that Defendants be cited to appear and answer herein, and that upon final hearing hereof, Plaintiffs recover:

1) Judgment against Defendants for money damages to reasonably compensate Plaintiff and all class and subclass members;

2) Pre-judgment interest at the highest legal rate;

3) Post-judgment interest at the highest legal rate per annum from the date of judgment until paid;

4) Costs of suit;

5) Reasonable and necessary attorney's fees; and,

6) Such other and further relief, both at law and at equity, as Plaintiffs may be entitled to receive.

Respectfully submitted,

/s/ Mitchell A. Toups
w/permission

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ATTORNEYS FOR PLAINTIFF

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing instrument has been forwarded to all counsel of record by regular or certified mail, return receipt requested, on this 6th day of October, 2000.

/s/ Mitchell A. Toups
w/permission
MITCHELL A. TOUPS

(5)

No. 03-1543

Supreme Court, U.S.
FILED
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In The Supreme Court of the United States

RICHARD R. RICHARD, JR., on behalf of himself and all others similarly situated,

Petitioners,

v.

HOECHST CELANESE CHEMICAL GROUP, INC., SHELL OIL COMPANY d/b/a SHELL CHEMICAL COMPANY, HOECHST CELANESE CORPORATION, and E. I. DuPONT de NEMOURS & COMPANY,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITIONERS' REPLY BRIEF

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1. The *Rooker-Feldman* Doctrine

This Petition asks the Court to focus its attention on the *Rooker-Feldman* doctrine, which is widely applied and poorly understood. The lower courts, in attempting to delineate the doctrine's scope, have spawned a complex, confusing and frequently contradictory body of precedent. *Rooker-Feldman* is being used to block access to federal courts with no defined standards and virtually no guidance from this Court. There is no consistency among the circuits and the reasoning of opinions that grapple with the doctrine's complexity is often sparse and unhelpful. The doctrine is based on loose language in decisions that are now 81 and 21 years old – *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923) and *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983). In recent decades, there has been a tremendous transformation of federal litigation and increase in parallel cases in state and federal courts. It is time to assess the *Rooker-Feldman* doctrine and establish limits on it, something this Court alone can do. This case invites the Court to provide guidance and bring harmony to a confusing, inconsistent body of law that lower courts have extended well beyond what the Court has authorized and arguably beyond what any defensible rationale for the doctrine would support.

Petitioners ask the Court to set aside lower court decisions holding that the *Rooker-Feldman* doctrine prevents federal courts from considering evidence that prior state court class action judgments do not bind absent future class members because the judgments were obtained in violation of due process requirements and thus should not receive full faith and credit. The decisions below hold that district courts cannot even examine evidence that prior state settlements were obtained by

collusion and fraud on the court, failed to provide adequate notice, representation or other constitutionally mandated protection to future class members and therefore are not entitled to full faith and credit in federal court.

Respondents insist that no such due process violations took place in *Cox v. Shell Oil Co.*, No. 18,844 (Chancery Court, Obion County, Tenn. Nov. 17, 1995) (applicable to Respondents Shell and Celanese) and *Spencer v. Shell Oil Co.*, No. CV-94-047 (Ala. Cir. Ct., Greene County Nov. 17, 1995) (applicable to Respondent DuPont). Or that even if they did, *Cox* and *Spencer* are entitled to full faith and credit regardless of any evidence Petitioners proffer because the *Rooker-Feldman* doctrine does not allow lower federal courts to consider such evidence.

The record below contains no findings of fact since the district court dismissed Petitioners' suit on the pleadings. Neither the district court nor the Fifth Circuit evaluated the *Cox* and *Spencer* settlement documents that Respondents include as appendices to their briefs. And Petitioners' evidence impugning the integrity of the state proceedings was not considered at all. The courts below never learned, for example, that the total amount of disclosed and *undisclosed* fees paid in *Spencer* exceeded the benefits paid to the class as a whole. Nor did the courts below have a chance to consider the implication of this astonishing fact on the allegations of collusion and fraud on the court. If the allegations in Petitioners' complaint are true, which courts must accept *arguendo* in ruling on Rule 12(b) motions, then *Cox* and *Spencer* are not entitled to full faith and credit under state or federal law. The district court, however, dismissed this case without giving any consideration whatever to the full faith and credit issue.

This case is significant because it holds that *Rooker-Feldman* trumps traditional requirements for due process and full faith and credit. In recent years, the *Rooker-Feldman* doctrine "has emerged as perhaps the primary docket-clearing workhorse for the federal courts." Susan Bandes, *The* Rooker-Feldman *Doctrine: Evaluating Its Jurisdictional Status*, 74 NOTRE DAME L. REV. 1175, 1175 (1999). What is most troubling about the reliance of lower federal courts on this doctrine is the disjunction between its heavy use and the lack of attention the Court has given to it. Its rise and rapid expansion has been almost entirely below the radar. This Court alone can determine if the scope of the *Rooker-Feldman* doctrine is or should be so sweeping.

2. Availability of Equitable Relief Under 18 U.S.C. § 1964.

This Court is also the final arbiter of another important issue raised by this case – whether 18 U.S.C. § 1964 allows private plaintiffs to seek equitable remedies against RICO wrongdoers. There is a conflict among the circuits over what the language of the statute means. *Religious Tech. Center v. Wollersheim*, 796 F.2d 1076 (9th Cir. 1986), *cert. denied*, 479 U.S. 1103 (1987) and successor cases in the Ninth Circuit interpret Section 1964 to deny equitable relief to private plaintiffs. These decisions, like the Fifth Circuit's decision, squarely conflict with the Seventh Circuit's analysis, which says the clear language of the statute authorizes equitable relief to private plaintiffs. *Nat'l Org. for Women, Inc. v. Scheidler,* 267 F.3d 687 (7th Cir. 2001), *rev'd on other grounds*, 537 U.S. 393 (2003). The Court recently granted certiorari in *Scheidler* to resolve this question but never reached it. The issue is

presented again in this case and should be resolved now to clarify the law.

3. State Action

Only this Court can resolve the conflict between circuits on the question of whether the "innocent agent" doctrine codified as 18 U.S.C. § 2(b) provides requisite state action to support Section 1983 and due process claims and also determine whether the doctrine applies to civil cases. The doctrine's application to this case was plainly misunderstood by the Fifth Circuit panel, who construed it as an admission that the state court judge was "innocent" and therefore no state action could exist. (Petition App. at 15.) However, *United States v. Lester*, 363 F.2d 369 (2d Cir. 1966) and the cases following it apply the innocent agent doctrine to find state action in regard to violation of 18 U.S.C. § 242, the criminal analogue of Section 1983. The color-of-state-law requirement of both these statutes was intended to be read "coextensively." *Dennis v. Sparks*, 449 U.S. 24, 29 n.5 (1980). It falls on this Court to determine if there is state action when a private actor uses fraud and duplicity to dupe a state court judge into approving an unethical and constitutionally defective settlement that the government applies to deprive Petitioners of their right to sue Respondents for damages.

CONCLUSION

For the reasons noted above and discussed in the Petition, the Court should grant the Petition for writ of certiorari.

Respectfully submitted,

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